TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1960

No. [redacted] 35

WATERMAN STEAMSHIP CORPORATION,
PETITIONER,

vs.

DUGAN & McNAMARA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FILED FEBRUARY 11, 1960
CERTIORARI GRANTED MARCH 28, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~697~~ 35

WATERMAN STEAMSHIP CORPORATION,
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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 27, 1960

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING, Plaintiff,

v.

WATERMAN STEAMSHIP CORPORATION, Defendant and Third-Party Plaintiff, Appellant,

v.

DUGAN & MCNAMARA, INC., Third-Party Defendant.

Appeal From Final Judgment of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 17035.

APPELLANT'S APPENDIX

[fol. 1]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RELEVANT DOCKET ENTRIES

June 11, 1954.	Complaint filed.
June 11, 1954.	Summons exit.
June 11, 1954.	Plaintiff's demand for jury trial filed.
June 25, 1954.	Appearance of Rawle & Henderson, Esqs. for defendant filed.
June 28, 1954.	Answer filed.
June 30, 1954.	Order to place case on trial list.
July 6, 1954.	Plaintiff's Interrogations filed.
July 21, 1954.	Summons returned "On 6/22/54 served and filed."
July 27, 1954.	Answers to plaintiff's interrogatories filed.
July 27, 1954.	Defendant's notice of taking oral deposition of plaintiff filed.
Feb. 29, 1956.	Motion and Order joining Dugan & McNamara, Inc. as a Third-party defendant filed. 3/1/56 noted and notice mailed.
Feb. 29, 1956.	Third-party Complaint filed.
Feb. 29, 1956.	Third-party summons exit.
Mar. 29, 1956.	Third-party Summons returned: "On 3-20-56 served" and filed.
May 31, 1956.	Defendant's notice of taking deposition of Matthew A. McGuire, filed.
June 7, 1956.	Defendant's notice of taking deposition of Matthew A. McGuire, filed.

[fol. 2]

Oct. 1, 1956.	Stipulation and Order that third party defendant be permitted to file an answer to third party Complaint filed. 10/2/56 noted.

Oct. 1, 1956. Third Party Defendant's Answer to Third Party Complaint filed.

Oct. 18, 1956. Order granting third party plaintiff leave to file Amended Third Party Complaint filed. 10/19/56 noted.

Oct. 18, 1956. Amended Third Party Complaint filed.

Dec. 1, 1956. Third party defendant's notice of taking deposition of plaintiff filed.

Dec. 4, 1956. Stipulation and Order of Court that answer to amended third party complaint may be filed, filed. Noted 12/5/56.

Dec. 4, 1956. Answer to amended third party complaint filed.

Dec. 5, 1957. Deposition of M. C. Bjorklund, filed.

Dec. 5, 1957. Deposition of Marlowe Bjorklund, filed.

Dec. 5, 1957. Jury called and sworn (as to Third-Party Action only). Clary.

Dec. 5, 1957. Trial—witnesses sworn.

Dec. 6, 1957. Trial resumed.

Dec. 6, 1957. Deposition of Captain Matthew A. McGuire, filed.

Dec. 9, 1957. Withdrawal of appearance of Beechwood & Lovitt, Esqs. and appearance of Beechwood, Lovitt & Murphy for third party defendant, filed.

Dec. 10, 1957. Trial resumed.

Dec. 11, 1957. Points for charge on behalf of Waterman Steamship Corporation filed.

[fol. 3]

Dec. 11, 1957. Points for charge on behalf of Dugan & McNamara, Inc. filed.

Dec. 11, 1957. Motion of Dugan & McNamara, Inc. for judgment on the whole record filed.

Dec. 11, 1957. Special interrogatories filed.

Dec. 11, 1957. Trial concluded.

Dec. 11, 1957. The Court directs a verdict in favor of Third-Party Defendant against Third-Party Plaintiff. Judgment accordingly. Clary.

Dec. 11, 1957. Judgment in favor of Third-Party Defendant against Third-Party Plaintiff, with costs, filed. 12-12-57 noted and notice mailed. Clary.

Jan. 7, 1958. Notice of Appeal by Waterman Steamship Corporation, filed. Copies to Freedman, Landy & Lorry, Esqs. and Beechwood, Lovitt & Murphy, Esqs.

Jan. 7, 1958. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

Third party plaintiff's exhibits 1, 2 and 3. Jan. 27, 1958.

[fol. 4]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed June 11, 1954

Jury Trial Demanded

Plaintiff, Jasper King, claims of the defendant, Waterman Steamship Corporation, the sum of Fifty Thousand Dollars ($50,000.00), upon a cause of action whereof the following is a true statement:

1. Plaintiff is a citizen and resident of the Commonwealth of Pennsylvania.

2. Defendant is a corporation organized and existing under and by virtue of the laws of the State of Alabama.

3. Plaintiff avers, upon information and belief, that at all times mentioned herein defendant owned, operated, managed, possessed and controlled the S. S. "Afoundria" in foreign, coastwise and intercoastal commerce

4. Plaintiff, on or about the 9th day of August, 1952, and at all times mentioned herein, was an employee of Dugan and McNamara, Inc., of Philadelphia, Pennsylvania, in the capacity of longshoreman.

5. On or about the 9th day of August, 1952, and at all times mentioned herein, Dugan and McNamara, Inc., of Philadelphia, was employed in discharging a cargo of sugar from the S. S. "Afoundria" by virtue of authority from and an understanding entered into with the said vessel's owners, charterers, operators and duly organized representatives, including the defendant herein.

6. On or about the 9th day of August, 1952, at or about 2:00 P. M., plaintiff, in the course of his employment, engaged in the performance of his duties in connection with the discharge of cargo from the S. S. "Afoundria" while the said S. S. "Afoundria" was in navigable waters of the United States and moored at Pier 46 North, was working aboard the S. S. "Afoundria" discharging one hundred [fol. 5] pound bags of raw sugar, when, because of the defective, unsafe and unseaworthy condition of the ship and the negligence of the defendant, a great number of bags of sugar became dislodged and crashed down upon the plaintiff with great force and effect, as the result of which he sustained the injuries which are more specifically set forth hereinafter.

7. Disregarding its duties in the premises, defendant, by its agents, servants, workmen and employees, was careless and negligent and the vessel was unseaworthy in:

(a) Failing to provide a safe place for plaintiff to perform his duties;

(b) Failing to properly supervise and inspect the stowage of the aforesaid cargo of sugar;

(c) Allowing and permitting said cargo of sugar to be stowed in such a negligent and careless manner as to constitute a danger to plaintiff and other workmen unloading said cargo;

(d) Failing to warn the plaintiff and other workmen of the dangerous and defective stowage of the cargo of sugar;

(e) Permitting plaintiff and other workmen to commence unloading operations in a dangerous place of employment;

(f) Failing to provide plaintiff with a safe and seaworthy vessel, appliances and appurtenances;

(g) Failing to use due care under the circumstances.

8. By reason of the negligence of the defendant and the unseaworthiness of the vessel as set forth above, plaintiff sustained severe injuries to his back, chest, shoulders, arms, legs, hands and feet; his back, chest, shoulders, arms, legs, [fol. 6] hands and feet and the muscles, nerves, tendons, blood vessels and ligaments attached thereto were severely wrenched, sprained, bruised, fractured and otherwise injured; he sustained a spiral fracture of the lower shaft of the fibula of the left leg; he sustained contusions and abrasions of the left shoulder; he sustained internal injuries, the full extent of which are not yet known; he was required to undergo long periods of hospitalization in the past, and upon information and belief avers that he will be required to undergo long periods of hospitalization in the future; he sustained a severe shock to his nervous system with injuries to his nerves and nervous system; he has suffered agonizing aches, pains, mental anguish and disability, and upon information and belief avers that he will suffer agonizing aches, pains, mental anguish and disability in the future; he has been unable to assume his usual duties and occupation for a long period of time in the past, and upon information avers that his injuries have become aggravated and permanent, and that he will be permanently and totally disabled from performing his usual duties and occupation in the future; he has been compelled to expend and incur obligations for medical attention in the past and will be required to do so in the future.

Wherefore, plaintiff, Jasper King, claims of the defendant the sum of Fifty Thousand Dollars ($50,000.00) with lawful interest thereon, and brings this action to recover same.

Freedman, Landy and Lorry, By Benjamin Kuby,
Attorneys for Plaintiff.

[fol. 7]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed June 28, 1954

1. The allegations in paragraphs 1, 2 and 4 of the complaint are admitted.

2. It is admitted that the defendant owned and operated the Steamship Afoundria in the foreign, coastwise and intercoastal commerce, but it is denied that at the time of the occurrences alleged in the complaint that the defendant fully managed, possessed and controlled the said vessel, but on the contrary avers that her holds, decks, equipment and appurtenances were in the sole and exclusive possession and control of Dugan and McNamara, Inc., which was an independent stevedoring company to the extent necessary in the performance of said stevedoring. It is further averred that the plaintiff and his fellow-employees, who were employees of said Dugan and McNamara, Inc., and the manner of performing said work, were under the exclusive direction and control of said Dugan and McNamara, Inc.

3. The allegations in paragraph 5 of the complaint, as qualified by the averments in paragraph 2 hereof, are admitted.

4. It is admitted, as alleged in paragraph 6 of the complaint, that on August 9, 1952, about 2:00 o'clock P. M. the said steamship Afoundria was in navigable waters, moored at Pier 46 North, and that the plaintiff at or about said time was working aboard the vessel and sustained certain injuries as the result of being struck by some bags of sugar. All of the other allegations in said paragraph are denied.

5. The allegations in paragraph 7 of the complaint are denied.

[fol. 8] 6. It is admitted, as alleged in paragraph 8, that the plaintiff sustained certain injuries, but the defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations pertaining to the

nature and extent of the plaintiff's injuries, his disability, and the consequences of said injuries, and therefore demands proof thereof. It is denied that any injuries sustained by the plaintiff were the result of any negligence on the part of the defendant, or unseaworthiness of the vessel.

7. As a further and separate defense the defendant avers, on information and belief, that the claimant's injuries were caused in whole or in part by his own negligence.

8. As a further and separate defense it is averred that the plaintiff assumes the risk of his employment.

Rawle & Henderson, By ....., 1910
Packard Building, Philadelphia 2, Pa., Attorneys for Defendant.

[fol. 9]

IN UNITED STATES DISTRICT COURT

AMENDED THIRD-PARTY COMPLAINT—Filed October 18, 1956

The amended third-party complaint of Waterman Steamship Corporation, third-party plaintiff, by its attorneys, against Dugan & McNamara, Inc., third-party defendant, respectfully shows to this Honorable Court upon information and belief as follows:

1. Plaintiff Jasper King instituted the above-captioned proceeding against Waterman Steamship Corporation alleging personal injuries resulting from the falling of one or more bags of raw sugar while discharging cargo in the hold of Steamship Afoundria at Pier 46, North Wharves, Philadelphia, on or about August 9, 1952. A true and correct copy of the complaint was annexed to the original third-party complaint as Exhibit "A."

2. The answer to the complaint averred upon information and belief that the accident was not caused by any unseaworthiness of the vessel or the negligence of those in charge of her, and that the holds, cargo spaces, equipment and gear involved in the discharging operation was under the exclusive management and control of Dugan &

McNamara, Inc. and their employees, as independent contractors. A true and correct copy of the answer was annexed to the original third-party complaint as Exhibit "B."

3. Third-party plaintiff is informed and believes on the basis of subsequent investigation that the accident occurred under the following circumstances:

The No. 4 lower hold of the vessel was loaded with bags of raw sugar at San Carlos, Negros Islands, P. I., completely across the hold from the forward bulkhead aft to [fol. 10] a point approximately midway of the tween deck hatch, where the bags were bulkheaded into a flat vertical wall approximately 20 feet high from the floor of the hold. The bulkheading, or cross-ties, extended inward for a depth of about six bags from the outer surface of the vertical wall, and beyond this depth the bags were laid directly in line and one above the other in accordance with proper stowage custom and practice, and with due and proper care to stow the bags in a safe and seaworthy manner. The exposed wall of bags did not move, shift, or become dislodged at any time material to this action. When the longshoremen, under the supervision and control of third-party defendant, proceeded to remove the bags at Philadelphia, they first broke down the bags in the square of the hatch to a distance of approximately six (6) feet or more, and removed the bags at this level, starting with the square of the hatch and working toward the forward bulkhead, thereby exposing the portions of the stow where the bags were placed directly one above the other, but without taking proper, safe and adequate precautions to prevent any vertical tiers, left unsupported by removal of adjacent bags, from falling from a height of six (6) feet or more.

While Jasper King and others were removing bags from a location about six feet aft of the forward bulkhead, one or more bags fell from the top of one tier and struck Jasper King, causing the various severe personal injuries mentioned in the complaint. The only condition attributable to the vessel which could have been material in connection with this accident was the placing or shifting of a bag at or near the bottom of the exposed tier in such a position that the bags above it would not be firmly supported when reached by the longshoremen, which condition must have

existed in order to produce the aforesaid accident under the circumstances disclosed by investigation. The said unstable, unsafe, and to that extent unseaworthy, condition of the stowed bags would not have resulted in the aforesaid acci-
[fol. 11] dent except for the direct, primary and substantial negligence of the third-party defendant's employees in breaking down the stowed bags to an unsafe depth and thereby causing the tier to become exposed without safe, reasonable and adequate lateral support, which condition was or should have been known to third-party defendant, its representatives, supervisors, foremen, and longshoremen.

4. The unseaworthy condition of the stow which was created by the shifting or the improper placing of a bag at or near the bottom of the exposed portion of the vertical tier from which the bag or bags fell, involved absolute liability on the part of Waterman Steamship Corporation as defendant in the original action brought against it by Jasper King, as plaintiff; but the direct, proximate, active and substantial cause of the accident upon which the absolute liability of the third-party plaintiff was predicated as a matter of law, was the negligence of third-party defendant, its agents, representatives and employees, in failing to perform the contracted stevedoring services in a safe, proper, customary, careful and workmanlike manner under the circumstances.

5. By reason of the absolute liability of third-party plaintiff caused by the primary and substantial negligence of third-party defendant, third-party plaintiff has entered into a fair, just and reasonable compromise settlement with plaintiff Jasper King in the net sum of $6,867.55, including loss of wages, impairment of earning capacity, limitation of activities, possible future medical care, and substantial pain and suffering.

6. Third-party plaintiff is entitled to full indemnity from third-party defendant for all sums paid over to Jasper King, plaintiff, in just and reasonable settlement of his claims against third-party plaintiff as aforesaid in
[fol. 12] the amount of $6,867.55 with interest thereon from

date of payment, and taxable costs in the present proceeding.

Wherefore, the third-party plaintiff demands judgment against third-party defendant as indemnity in the sum of $6,867.55, with interest and costs.

Rawle & Henderson, By ....., 1910
Packard Building, Philadelphia 2, Pa., Attorneys for Third-Party Plaintiff.

[fol. 13]

IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED THIRD-PARTY COMPLAINT—Filed December 4, 1956

The Answer of the third-party defendant, Dugan & McNamara, Inc., by its attorneys, to the Amended Third-Party Complaint of the third-party plaintiff, Waterman Steamship Corporation, respectfully alleges, upon information and belief, as follows:

1. It is admitted that Jasper King instituted the above captioned proceedings. It is admitted that he alleged injuries. It is denied, however, that he suffered the injuries alleged. The third-party plaintiff, in paragraph 6 of its Complaint, alleged, among other things, "the defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations pertaining to the nature and extent of the plaintiff's injuries, his disability, and the consequence of said injuries, and therefore demands proof thereof."

2. It is admitted that the Answer to the Complaint avers that the Waterman Steamship Corporation averred that the vessel was not unseaworthy or that there was any negligence of those in charge of her. Third-party defendant avers that if the vessel was seaworthy and there was no negligence of the Waterman Steamship Corporation, the said Waterman Steamship Corporation was not liable in any respect to the plaintiff, Jasper King.

3. Denied. The third-party plaintiff admits in paragraph 3 of its Complaint that the manner and method

in which the bags were stowed caused the vessel to be unseaworthy and was the underlying cause of the accident.

4. Denied. The third-party defendant demands strict proof of the absolute liability on the part of the Waterman Steamship Corporation as defendant. It is denied that the [fol. 14] liability of the Waterman Steamship Corporation was predicated upon negligence of the third-party defendant.

5. Denied. Third-party plaintiff entered into indemnity agreements with the plaintiff, Jasper King.

6. It is denied that the settlement was reasonable or just. It is further denied that the third-party defendant is in any way bound by the action of the third-party plaintiff.

First Defense

Third-party defendant is the employer of Jasper King, the plaintiff in this case, and the accident which is the subject of the litigation occurred under circumstances making the third-party defendant responsible to the said plaintiff for benefits under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. A. Sec. 901 et seq. Sec. 5 of said Statute, 33 U. S. C. A. Sec. 905, provides that upon payment of compensation under the provisions of the said statute, third-party defendant is discharged of all liabilities to the plaintiff or any other person otherwise entitled to bring suit against the third-party defendant. Third-party defendant asserts that benefits under the said Longshoremen's and Harbor Workers' Act have been tendered and accepted by the plaintiff. Third-party defendant therefore alleges that the said statute is the complete defense to the Amended Third-Party Complaint and therefore prays that the action be dismissed as to the Third-party defendant.

Second Defense

To the extent that the amended Third-Party Complaint purports to set forth a cause of action against third-party defendant by way of indemnity the third-party defendant

denies that there is any contract upon which indemnity may be founded.

[fol. 15] *Third Defense*

The Amended Third-Party Complaint fails to state any ground for relief and fails to set forth any cause of action against the third-party defendant upon which relief can be granted, and therefore the Amended Third-Party Complaint must be dismissed.

Wherefore, Dugan & McNamara, Inc., denies that the third-party plaintiff is entitled to any judgment against it by way of indemnity or otherwise, and prays that the Amended Third-Party Complaint be dismissed with costs assessed against the third-party plaintiff.

Beechwood and Lovitt, By George E. Beechwood, Beechwood Building, 2009 Walnut Street, Philadelphia 3, Pa., Attorneys for Third-Party Defendant.

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* * * * * * *

[fol. 214]

SIDEBAR COLLOQUY RE STIPULATION

Mr. Beechwood: May we see Your Honor at side bar?
The Court: Surely. Come up.

(The following took place at side bar:)

Mr. Beechwood: Mr. Kildare, I think you will concede that there was no agreement, written or oral, between the ship and Dugan & McNamara.

Mr. Kildare: There was no contract between Dugan & McNamara and the Waterman Steamship Corporation, that is correct.

Mr. Beechwood: Oral or written.

Mr. Kildare: I agree to that. That is right. We concede that, though we of course deny its materiality under the cases.

[fol. 215] Mr. Beechwood: We understand that. If you didn't, I would have to bring in somebody from Dugan & McNamara to prove it, that is all.

Mr. Kildare: There is no problem there. We concede that, certainly.

(End of proceedings at side bar.)

The Court: All right, gentlemen, we can proceed now.

* * * * * * * * *

[fol. 263]

STATEMENTS OF THE COURT TO THE JURY AND TO COUNSEL AT THE CLOSE OF THE TRIAL RELATING TO REASONS FOR GRANTING DEFENDANT'S MOTION FOR JUDGMENT

(The jury returned into court at 11:15 A.M., at which time the following took place:)

The Court: Members of the jury, I asked you to stay out this morning because I wanted the law of this case argued rather fully, and as far as your concern with the case goes, that will be at an end when I finish the few words that I have to say to you.

Under our rules a party may move for judgment at the conclusion of a case, and it is then the duty of the Court to determine whether, under the facts as established from the witness stand, depositions, and whatever other evidence in the nature of documents or otherwise introduced, there is some question for you to pass on. I have determined that, under the law, the case should not be passed on by you.

Ordinarily, when a ship comes into port, that ship must be discharged; the cargo must be taken off and put on the dock. Historically that was the ship's duty, and the members of the crew were charged with the obligation of transferring that cargo from the ship to the dock. With the improvement in all lines of industry, shipowners found it to their advantage to transfer that obligation to an independent contractor known as a stevedoring company, who employ longshoremen of the type that you have seen here in the last week. It is the stevedore's duty to remove that cargo from the ship to the dock. The ship, however, cannot avoid its liability to its own seamen nor to the stevedores, who are entitled to the protection afforded sailors from time immemorial. The Supreme Court of the United States has held in several cases that that is a non-delegable duty [fol. 264] on the part of the ship and that the ship's re-

sponsibility must go to the stevedores or longshoremen. So if a ship is in any way unseaworthy and as the result of that unseaworthiness one of the stevedores is injured, that stevedore has a right of recovery against the ship itself. That was the situation in this case at the outset when Jasper King filed his complaint.

Now, you heard read into the record yesterday the basis of the shipowner's complaint against the stevedore. That was read in here yesterday, in which, as a result of investigation, they said that the ship became unseaworthy because of a shifting or a misplacing of a bag at the time of the loading of this particular vessel at Port Negros in the Philippine Islands:

If the ship was unseaworthy, it owed an obligation to that longshoreman if he was injured as a result of that unseaworthiness. There is no doubt about the injury. There is no doubt that the money that was paid to that man, something in the neighborhood of $6800, was reasonable, fair compensation for the injuries that Jasper King sustained up there that day. However, if the ship was not unseaworthy and the ship was not negligent in affording the man a safe place to work, then the payment was made as a volunteer and there is no right of recovery against the stevedore.

You have heard the testimony here as I have heard it. I don't recall that there is one iota of testimony that there was any misplaced or shifted bags on that ship. I don't remember one iota of testimony to substantiate that. The expert Keeler, who appeared to be a gentleman who knew his business, testified without reserve that it was the manner of unloading, that the bags were brought down in too high a pile, that caused it to buckle, and he stated unequivocally also that it was the sole negligence of Dugan & McNamara, the stevedore, acting through its employees, that created the condition that caused the injury. In other words, he attributed the sole fault of this accident, not to the ship, [fol. 265] not to unseaworthiness, not to any negligence on the part of the vessel, but solely negligence on the part of the stevedore. Under those circumstances I would not be permitted to let the case go to you for indemnity on the part of the stevedore to the shipowner.

We have through the Congress of the United States a Longshoremen's and Harbor Workers' Workmen's Compensation Act. When they are injured in the course of their duties, it is the duty of the stevedoring company to pay them certain benefits which the law requires and which ordinarily are paid by an insurance company, but that is his sole remedy against his employer. He may not sue his employer for injuries, and the law, while providing benefits, also takes in rights he may have had against his employers or fellow employees in connection with any recovery for those injuries. There have been many cases where indemnity has been allowed. For instance, one case I can illustrate came up in the argument this morning. The stevedore himself brought aboard an instrument of unloading which was defective, and it was used, and the employee was injured. He sued the ship, and the court allowed a recovery against the ship, but they also said that under the theory of warranty to do the work in a proper and safe fashion on the part of the stevedore, he owed indemnity back to the shipowner, and they allowed a recovery in that case, but that isn't this case.

This is an unusual case. It may seem hard to understand how Dugan & McNamara got aboard that ship when there was no contract, oral or written, with the Waterman Steamship Company. That has been stipulated of record and it is a fact in this case on which, in part, I am basing my decision. It hasn't appeared of record how they got aboard the ship, and it is not of record, I happen to know, because I have been informed, that the owner of the cargo did their own stevedoring, which meant that the National Sugar Refining Company were responsible for taking it off, and that they engaged Dugan & McNamara, but there is a [fol. 266] difference of opinion, members of the jury, among the several courts of this country, the courts of appeals, as to whether or not, in a circumstance similar to this one, a shipowner is entitled to indemnity for payments made to an injured seaman stevedore. It seems clear to me from a reading of the cases in our circuit that in order to have indemnity, it must stem from a contract, that there must be contractual obligations stemming from the stevedore to the shipowner, and that can be either a written contract

or an oral contract, and the contract does not even have to provide for indemnity. In a proper case the court says that the contract to take the cargo off has implicit in it the obligation to do it in a workmanlike, safe manner, but here there is absolutely no contract running between Dugan & McNamara and the ship.

As I said, it does not appear of record just exactly what the contract is or its terms that they may have had with someone else, but I have come to the conclusion that under all the established facts in this case—and it is a real technical question of law—that there can be no right of indemnity under the cases of our circuit as I read them, and therefore am going to grant the motion of the third-party defendant, Dugan & McNamara, for judgment in its favor and against the third-party plaintiff, the Waterman Steamship Company.

You can rest assured, ladies and gentlemen, that this is not the end of the case. This happens to be a type of case that the Supreme Court had before it and refused to answer. I think it will be sent back there very shortly, unless I am reversed on my thinking by this circuit, which always can happen.

Ladies and gentlemen, that will conclude your service on this case. I will ask you to return to your jury room, and perhaps I will see some more of you on the next case.

Thank you very much.

Mr. Kildare: If the Court please, there is just one point we would like to suggest, that Your Honor may have erred [fol. 267] in quoting the record. That is your reference to the admissions or the pleadings that were made here. You indicated that Waterman had said that the bag shifted, and so on, at the time of loading. Of course, that is not quite correct—

The Court: Had been improperly placed at the time of loading or had shifted on the journey.

Mr. Kildare: The placing or shifting of a bag. It did not, sir, exclude the possibility that that shifting had occurred during the ocean voyage.

The Court: No, I didn't mean to exclude that either. I thought that was part of what I said. At least I was thinking of it at the time I said it.

Mr. Kildare: In case it was material to Your Honor's thinking, I wanted to call that to your attention.

The Court: No, I haven't made any difference on that.

Mr. Kildare: May we have an exception to Your Honor's ruling?

The Court: Oh, yes, certainly you may.

Mr. Beechwood: May I thank Your Honor and the members of the jury for the very kind attention.

Mr. Kildare: I am sure we will agree with that.

The Court: You may retire, members of the jury.

I would like to have docketed all points for charge, suggested interrogatories, and motions for judgment on the record. I would like to have all of them immediately docketed so that the case may proceed, and so that we can save time for appeal and otherwise, Mr. Kildare, I will instruct the Clerk to enter judgment on the verdict for the defendant.

Mr. Kildare: You are, I think, entering judgment on the motion to dismiss, are you not?

[fol. 268] The Court: I am entering judgment. I have considered this a motion for judgment under Rule 50.

Mr. Kildare: Very good.

The Court: Therefore the Court will enter judgment in favor of the defendant.

Mr. Beechwood: Thank you, Your Honor.

Mr. Kildare: We respectfully except to the entry of that judgment.

(Adjourned at 11:35 A.M.)

[fol. 268a] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JASPER KING, Plaintiff,

v.

WATERMAN STEAMSHIP CORPORATION, Defendant & Third-Party Plaintiff,

v.

DUGAN & MCNAMARA, INC., Third-Party Plaintiff.

JUDGMENT—December 11, 1957

Before Clary, J.

And Now, to wit: December 11th, 1957, in accordance with the Verdict as Directed by the Court, it is Ordered that Judgment be and is hereby entered in favor of Third-Party Defendant, Dugan & McNamara, Inc., and against Third-Party Plaintiff, Waterman Steamship Corporation, with costs.

By the Court:

[fol. 268b] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 269] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING,

v.

WATERMAN STEAMSHIP CORPORATION (deft. and 3d-party pltf.), Appellant,

v.

DUGAN & McNAMARA, INC. (3d-party deft.).

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

ORDER SETTING CASE DOWN FOR REHEARING EN BANC—August 5, 1958

It is Ordered that the above-entitled case be set down for rehearing before the Court en Banc.

By the Court, Kalodner, Circuit Judge.

Dated: August 5, 1958

[fol. 270]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING,

v.

WATERMAN STEAMSHIP CORPORATION, Defendant and Third-Party Plaintiff, Appellant,

v.

DUGAN & McNAMARA, INC., Third-Party Defendant, Appellee.

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued June 10, 1958

Reargued December 1, 1958

Before: Biggs, Chief Judge; Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed January 16, 1959

Per Curiam:

This is an appeal by a third-party plaintiff, defendant to the original negligence claim, from a decision that as a matter of law it is not entitled to be indemnified by the appellee, against which it has made the present third-party claim.

It is admitted that appellant, a shipowner, has paid damages to the original plaintiff, a stevedore, for shipboard injuries caused in part by the improper stowage of cargo. [fol. 271] Appellant concedes its absolute liability to the injured stevedore for the hurtful consequences of this un-

seaworthy condition. However, appellant claims indemnity from the appellee, the stevedoring company which employed the injured man, on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was.

How this case might have stood had the shipowner employed the stevedoring company to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation between shipowner and stevedoring company. Rather, as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Thus, whatever arrangement was made for unloading the cargo,[1] the shipowner was not party to it and claims no benefit under it.

The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. Any obligation of a stevedoring company to indemnify a ship for shipboard injury of its employees in the course of their employment must be bottomed on agreement between the parties, express or implied in fact. We have so stated in *Brown* v. *American-Hawaiian S. S. Co.*, 3d Cir. 1954, 211 F.2d 16, 18 and *Crawford* v. *Pope & Talbot, Inc.*, 3d Cir. 1953, 206 F.2d 784, 793. We adhere to that view of the matter.

The judgment will be affirmed.

[fol. 272] BIGGS, *Chief Judge*, dissenting.

Deeming the evidence to be insufficient to support a finding that the ship's cargo-loading gear which broke in-

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[1] It was stated to us in argument and mentioned by the court below in directing a verdict against the third-party claim that the stevedoring company had been employed by the owner of the cargo to unload it. But no evidence was introduced concerning this matter and counsel for the appellant stated to the court below that the particular contractual arrangement under which the unloading was performed was not material to the third-party claim.

juring the longshoreman was unseaworthy, this court in Crumady v. The Joachim Hendrik Fisser, 249 F.2d 818, 821 (1957), cert. granted 357 U.S. 903 (1958), stated that for that reason, "[W]e do not reach the substantial question raised by the impleaded respondent [the stevedoring company] whether there would have been legal basis for making it an indemnitor, had the ship's liability been sustained." In Crumady there was no express contract, written or oral, between the shipowner and the stevedoring company for the unloading of the vessel. 142 F.Supp. 389 (D.N.J. 1956), at p. 401. In the instant case there was no express contract, written or oral, for the unloading of the ship between the shipowner, Waterman, and the stevedoring company, Dugan and McNamara, Inc., the latter company having unloaded the vessel perhaps because of an "understanding" with the shipowner, Waterman.[1] "The

[1]Apparently there was no express contract, oral or written, for the unloading of the vessel. It should be noted, however, that paragraph 5 of the injured longshoreman's complaint alleges that Dugan and McNamara, Inc. was employed to discharge the cargo "by virtue of authority from and an understanding entered into" by Dugan and McNamara, Inc. with the vessel's "owner", alleged to be Waterman. Waterman's answer to the longshoreman's complaint, paragraphs 2 and 3, admitted the allegations of paragraph 5 of the complaint with an immaterial qualification. The amended third-party complaint is silent as to any contract or "understanding" for the unloading of the vessel. The second defense of the amended answer to the third-party complaint denies that "there is any contract upon which indemnity may be founded".

A stipulation entered into by counsel for Dugan and McNamara, Inc. and counsel for Waterman, transcript p. 296, in the form of question and answer given at sidebar during the trial was as follows: Counsel for Dugan and McNamara, Inc. stated to counsel for Waterman, "I think you will concede there was no agreement, written or oral, between the ship and Dugan and McNamara." Counsel for Waterman replied, "There was no contract between Dugan and McNamara and the Waterman Steamship Corporation, that is correct." Counsel for Dugan and McNamara, Inc. then said, "Oral or written." Counsel for Waterman replied, "I agree to that. That is right. We concede that, though we of course deny its materiality under the cases."

The nature of the arrangement for the unloading of the vessel is far from plain on this record but the pleading and the statements of counsel may express the view that even though there was no contract, oral or written, there was nonetheless an "understanding"

[fol. 273] substantial question" referred to by this court in Crumady is before us in the instant case. It is whether the shipowner may recoup its loss against the stevedoring company if that company's negligence caused the injury to the longshoreman, there being no express contract for the unloading of the ship entered into by the shipowner and the stevedoring company.

In so stating I am not unmindful of the ruling of this court in Hagans v. Farrell Lines, 237 F.2d 477 (1956), that neither indemnity nor contribution can be recovered by the shipowner from the stevedoring company where the shipowner's negligence has concurred with that of the stevedoring company in causing the accident. As was stated in the dissenting opinion in Hagans, 237 F.2d at p. 483, the decision of this court in that case unduly limited the scope of Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), and was in apparent conflict with American President Lines v. Marine Terminal Corp., 234 F.2d 753 (9 Cir. 1956), cert. den. 352 U.S. 926 (1956).[2]

I think, however, that the Hagans doctrine, even assuming its soundness, is inapplicable under the pleadings and the evidence in the case at bar for the jury would have been entitled to find, as contended by Waterman, that the "direct, proximate, active and substantial cause of the accident" was the negligence of the stevedoring company. I cannot conclude that the decision of the Supreme Court in Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282 (1952),

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between Waterman and Dugan and McNamara, Inc. that Dugan and McNamara, Inc. would unload the vessel but that such an understanding could not support indemnity. For the reasons set out at a later point in this opinion I think it is immaterial that there was no express contract, written or oral.

[2] It should be noted that the case at bar was heard before the court en banc as was the Hagans case and for this reason the present writer believes that a dissent should be recorded not only in the instant case but also to the fundamental principle involved in the majority opinion in Hagans and open for reconsideration here since a court en banc sat to adjudicate the instant case. As to possible rejection of this court's view in Hagans by the Supreme Court, see the illuminating opinion of Judge Hoffman in Ravel v. American Export Lines, 162 F. Supp. 279, 288 (E.D. Va. 1958).

would prevent recovery by the shipowner if the stevedor- [fol. 274] ing company's negligence was the direct, active, proximate and substantial cause of the longshoreman's injury. If the jury should so find, no principle of contribution necessarily would be involved for the law would then require no division of damages between the shipowner and the stevedoring company. Indemnity arises from a contract, express or implied, and enforces a duty on the wrongdoer to respond for damages. Thomas v. Malco Refineries, Inc., 214 F.2d 884, 885 (10 Cir. 1954). See Brown v. American-Hawaiian S.S. Co., 211 F.2d 16, 18 (3 Cir. 1954). Cf. the circumstances and the decision in Crawford v. Pope & Talbot, Inc., 206 F.2d 784, 793 (3 Cir. 1953). I had thought that the independent right to indemnity was established in this circuit by the decision in the case last cited. We point out also that in Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563, 569 (1958), the Supreme Court stated: "[W]e believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate.", citing Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., *supra.*

Last, indemnity for the shipowner need not necessarily be based on an express contract between the shipowner and the stevedoring company. When a stevedoring company goes on a ship to unload it the stevedoring company represents in substance to the shipowner that the unloading will be done with reasonable care and in a reasonably safe manner under the circumstances. The stevedoring company may be deemed to offer a unilateral contract to the shipowner saying in substance: "If you will permit me to come upon your ship and unload it I will use reasonable care in the unloading." The shipowner accepts the offer by making its ship available. Such an arrangement or contract was in effect between the shipowner and the stevedoring company in Hagans, creating what was described there as a "relational duty", 237 F.2d at p. 481. As was [fol. 275] stated in the majority opinion in Brown v. American-Hawaiian S.S. Co., *supra,* 211 F.2d 16, n.4 cited to the text at p. 18: "It is difficult to conceive of a situation where there is no contract, either express or implied,

between an employer whose men are aboard or about a vessel and the owner or charterer of such vessel." I think it is impossible. Cf. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., *supra*, 350 U.S. at pp. 132-135.

Although the record does not reveal how Dugan and McNamara, Inc. came on board the vessel, some person must have engaged that company for stevedoring. Even if we were to assume that the consignee, or consignor, or some disinterested stranger, had hired Dugan and McNamara, Inc. to unload the cargo, a relationship, contractual in nature, would have arisen whereby Dugan and McNamara, Inc. would have been obligated to indemnify Waterman for damages which Waterman had sustained by reason of Dugan and McNamara, Inc.'s failure to unload the vessel as its duty requires. Under the assumed circumstances Waterman could be deemed to be a third-party beneficiary of the contract made by the consignee or the consignor with Dugan and McNamara, Inc. for the unloading.

Or if it be the fact, as is asserted, that there was no express contract, written or oral, Dugan and McNamara, Inc.'s obligation to indemnify Waterman could be held to be one of *implied assumpsit*.[3] Certainly it should not be assumed that Dugan and McNamara, Inc. came upon the vessel by accident and accidentally unloaded it and there is evidence tending to prove that the longshoreman was [fol. 276] injured because Dugan and McNamara, Inc. failed in its duty.

Clearly there were issues here involved as to the respective liabilities of the parties, Waterman and Dugan and

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[3] At common law assumpsit was implied where an undertaking was presumed to have been made by a party from his conduct although he had made no express promise. If there was a breach of contract in the performance the performer was held liable, *ex contractu*. Moses v. Macferlan, 97 Eng. Rep. 678 (1760). See also *Corpus Juris Secundum* Vol. 42, *Indemnity*, Section 21, pp. 596-597 and the dissenting opinion of Judge Goodrich in P. Dougherty Co. v. United States, 207 F.2d 626, 651 (1953), citing Dean Ames, writing in 2 Harv. L. Rev. 1 on "The History of Assumpsit", set out on page 2. See also Revel v. American Export Lines, referred to in note 2, *supra*, 162 F. Supp. at pp. 286-287.

McNamara, Inc., which should have gone to the jury with proper instructions. See again Weyerhaeuser S.S. Co. v. Nacirema Co., *supra*, 355 U.S. at p. 568.

For the reasons stated I respectfully dissent.

[fol. 277] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING,

vs.

WATERMAN STEAMSHIP CORPORATION, Appellant,

vs.

DUGAN & MCNAMARA, INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

JUDGMENT—January 16, 1959

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

January 16, 1959

[fol. 278] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,537

[Title omitted]

MOTION TO STAY RETURN OF MANDATE AND GRANT REHEARING NUNC PRO TUNC—Filed February 27, 1959

To the Honorable, the Judges of the Said Court:

Waterman Steamship Corporation, Appellant, by its attorneys, by reason of the decision of the Supreme Court of the United States in *Crumady* v. *Joachim Hendrik Fisser* v. *Nacirema Operating Co., Inc.*, announced on February 24, 1959, (27 United States Law Week 4158), respectfully moves this Honorable Court for leave to file a petition for rehearing in the above-captioned appeal nunc pro tunc, and to extend the stay of mandate from March 2, 1959 to April 1, 1959, or grant such other and further relief as may be deemed just in the premises.

Rawle & Henderson, By Harrison G. Kildare, Attorneys for Appellant.

[fol. 279] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Title omitted]

Present: Biggs, Chief Judge, and Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME AND STAYING ISSUANCE OF MANDATE—Filed March 10, 1959

Upon consideration of the motion filed by appellant on February 27, 1959 in the above-entitled case,

It is Ordered that leave be, and it hereby is granted appellant to file a petition for rehearing out of time on or before March 26, 1959;

It is further Ordered that the issuance of the mandate of this Court be stayed until further order of this Court.

By the Court,

William H. Hastie, Circuit Judge.

March 10, 1959

[fol. 280] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

PETITION FOR REHEARING—Filed March 17, 1959

Waterman Steamship Corporation, appellant herein, petitions for a rehearing and shows to this Honorable Court as follows:

I.

On January 16, 1959 this Court affirmed the judgment of the court below that appellant, a shipowner, was barred as a matter of law from claiming indemnity against Dugan & McNamara, Inc., a stevedoring company, for the reasonable sum paid to Jasper King, a longshoreman employed by the stevedoring company, in settlement of King's claim against petitioner for damages arising from personal injury while engaged in discharging bagged sugar from petitioner's vessel in the port of Philadelphia.

The decision of this Court was based upon the absence of contractual privity between petitioner, as shipowner, and the stevedoring company, whose services had been engaged by and on behalf of the charterer of the vessel. The opinion stated in part as follows:

> "The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. Any obligation of a stevedoring company to indemnify a ship for shipboard injury of its employees in the course of their employment must be bottomed on agreement between

the parties, express or implied in fact. We have so stated in Brown v. American Hawaiian S. S. Co., 3d Cir. 1954, 211 F. 2d 16, 18 and Crawford v. Pope & Talbot, Inc., 3d Cir. 1953, 206 F. 2d 784, 793. We adhere to that view of the matter."

The dissenting opinion of Chief Judge Biggs noted that "the jury would have been entitled to find, as contended by Waterman, that the 'direct, proximate, active and substantial cause of the accident' was the negligence of the [fol. 281] stevedoring company." Consequently, the only issue on which the judgment was affirmed was the absence of any contractual arrangement between the shipowner and the stevedoring company, either *express or implied in fact.*

Petitioner's contention that the stevedoring company was under a contractual obligation *implied by law* from the relationship of the parties was rejected. This conflicts with decisions of the courts of appeals in the Ninth Circuit (*States S. S. Co.* v. *Rothschild International Stevedoring Co.*, 205 F. 2d 253, and *American President Lines* v. *Marine Terminal Corp.*, 234 F. 2d 753); in the Second Circuit (*Rich* v. *U. S.*, 177 F. 2d 688, and see *Allen* v. *States Marine Corporation of Delaware*, 132 F. Supp. 146, S. D. N. Y.); in the Fourth Circuit (*Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497); in the Tenth Circuit (*Thomas* v. *Malco Refineries, Inc.*, 214 F. 2d 884); and in the District Court of Massachusetts (*Considine* v. *Black Diamond S. S. Corp. et al.*, 163 F. Supp. 109).

It also fails to give full effect to the decisions of the Supreme Court of the United States in *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic Steamship Corp.*, 350 U. S. 124 (1956), and in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563 (1958).

II.

The ruling in the present case directly conflicts with the decision of the Supreme Court of the United States in *Crumady* v. *Joachim Hendrik Fisser* v. *Nacirema Operating Co., Inc.*, 27 U. S. Law Week 4158 (decided February 24, 1959), in which the Court, reversing the Third Circuit,

granted indemnity *in the absence of contractual privity.* The opinion states (at 27 L. W. 4159):

> "The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recog- [fol. 282] nizes rights in third-party beneficiaries. Restatement, Law of Contracts, Sec. 133. Moreover, as we said in the Ryan case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U. S. at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' Id., at 133-134. See MacPherson v. Buick Motor Co., 217 N. Y. 382.
>
> "We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over."

This statement of the law applies with equal force to the present case, where there was sufficient evidence for submission to the jury the question of the stevedoring company's negligence "bringing into play" the unseaworthy condition of the bags at the time of their removal. Under the circumstances, the petitioner is entitled to a new trial.

Respectfully submitted,

Rawle & Henderson, 1910 Packard Building, Philadelphia 2, Pa., Attorneys for Petitioner.

Of Counsel: Harrison G. Kildare, Thomas F. Mount.

Certificate of Counsel

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court; and that it is not filed for the purpose of delay.

Thomas F. Mount, Of Counsel to Petitioner.

[fol. 283] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

[Title omitted]

Present: Biggs, Chief Judge; and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

ORDER VACATING JUDGMENT, WITHDRAWING PER CURIAM AND DISSENTING OPINION AND DIRECTING FILING OF SUPPLEMENTAL BRIEFS—April 7, 1959

Upon consideration of the petition for rehearing and of the answer thereto, in the above entitled case,

It is Ordered that the judgment of this Court entered January 16, 1959 be and it is hereby vacated and that the Per Curiam and dissenting opinion filed January 16, 1959 be and they are hereby withdrawn;

It is Further Ordered that the parties may file supplemental briefs as to the effect of the decision by the Supreme Court of the United States in *Crumady, Petitioner* v. *"Joachim Hendrik Fisser", etc. Petitioner* v. *Nacirema Operating Co., Inc.*, No. 62, October Term 1958, on the issues in the above entitled case;

It is Further Ordered that decision is reserved as to whether and when oral argument is to be had.

By the Court:

William H. Hastie, Circuit Judge.

Dated: April 7, 1959

[fol. 284]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING,

v.

WATERMAN STEAMSHIP CORPORATION, Defendant and Third-Party Plaintiff, Appellant,

v.

DUGAN & McNAMARA, INC., Third-Party Defendant, Appellee.

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued June 10, 1958

Reargued December 1, 1958

Reargued October 5, 1959

Before: Biggs, Chief Judge; Goodrich, McLaughlin, Kalodner, Staley, Hastie and Forman, Circuit Judges.

OPINION OF THE COURT—Filed November 17, 1959

By HASTIE, *Circuit Judge.*

This is an appeal by a third-party plaintiff from a decision that as a matter of law it is not entitled to be in- [fol. 285] demnified by the appellee, against which it has made the present third-party claim. The appeal, originally argued before a division of this court, has been reargued twice before the court en banc. We ordered the second re-

argument so that the parties might fully present their views concerning the force and effect of the decision of the Supreme Court in *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, decided February 24, 1959, after the first reargument. This second reargument has also permitted Judge Forman, who has joined us since the first reargument, to participate in the decision of a doubtful question of importance which has divided us.

In the court below appellant shipowner, Waterman Steamship Co., was both defendant to the original maritime tort claim of a stevedore for shipboard injury and third-party plaintiff claiming indemnity from appellee, Dugan & McNamara, Inc., the stevedore's employer. The shipowner now appeals from a decision that it is not entitled to indemnity from the stevedoring company for an amount it has paid in satisfaction of the stevedore's principal claim. In the present posture of the litigation it must be and is admitted that the stevedore's injuries were caused in part by improper stowage of cargo. Appellant concedes its absolute liability to the injured stevedore for the hurtful consequences of this unseaworthy condition. However, appellant claims indemnity from the stevedoring company on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was.

How this case might have stood had the stevedoring company been employed by the owner or operator of the ship to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third party complaint nor sought to prove any contractual relation or undertaking as the basis of the alleged liability. Rather, [fol. 286] as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Whatever arrangement was made for unloading the cargo,[1]

[1] It was stated to us in argument and mentioned by the court below in directing a verdict against the third-party claim that the stevedoring company had been employed by the owner of the

the shipowner was not party to it and on the present record claims no standing under it.

The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. We have said as much in *Brown* v. *American-Hawaiian S.S. Co.*, 3d Cir., 1954, 211 F.2d 16, 18 and *Crawford* v. *Pope & Talbot, Inc.*, 3d Cir., 1953, 206 F.2d 784, 792. Any obligation of a stevedoring company to indemnify a shipowner for shipboard injury of its employees in the course of their employment must be bottomed on a promise, express or implied in fact, of the stevedoring company. Otherwise, tort liability would be imposed upon the stevedoring company for negligent injury of its employee, a result prohibited by the Longshoremen's and Harbor Workers' Act. However, it is strongly urged that the Supreme Court in *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, has rejected the reasoning and impaired the authority of the *Brown* and *Crawford* cases. That contention is our principal concern here.

In the *Crumady* case the Supreme Court reviewed a decision of this court. We had not adjudicated the question of indemnity because it had been our view that there was no liability on the principal claim. However, the Supreme Court reversed us on the principal claim and then considered and sustained the indemnity claim. Thus, in considering what the Supreme Court said and did in the *Crumady* case we deal with an entirely familiar record.

Crumady was a libel in rem against a vessel by a stevedore who had been injured in unloading cargo. The ship [fol. 287] impleaded the stevedoring company which had undertaken the unloading operation and had employed the principal plaintiff. The evidence showed that the shipowner had chartered the vessel to an operator who had contracted with the stevedoring company to unload the vessel. In these circumstances the Supreme Court ruled that "[t]he warranty [of workmanlike service] which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are

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cargo to unload it. But no evidence was introduced concerning this matter and counsel for the appellant stated to the court below that the particular contractual arrangement under which the unloading was performed was not material to the third-party claim.

parties to the contract or not." 358 U.S. at 428. The court added that the circumstances under consideration suffice "to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries". *Ibid.* Thus, the actual holding of the *Crumady* case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the carriage was on such terms and conditions that the consignee was responsible for the discharge of its own goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer *in invitum*. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of contribution between tortfeasors and not one of indemnification for breach of warranty. And the Supreme Court has clearly ruled that in these stevedore injury cases the shipowner may not require contribution [fol. 288] from the stevedoring company. *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 1952, 342 U.S. 282.

We find no indication that the Supreme Court in the *Crumady* case intended to abrogate or disregard the distinction between a permitted recovery-over based on contract and a prohibited misuse of the concept of indemnity to obtain contribution from a tortfeasor who enjoys the protection of the Longshoremen's and Harbor Workers' Act. We cannot square a recovery in this case with adherence to that distinction.

The judgment will be affirmed.

BIGGS, *Chief Judge*, dissenting.

The record shows that the accident to King, the longshoreman whose claim against Waterman Steamship Corporation, the third-party plaintiff-appellant, was reasonably compromised by it, was caused by two factors. The accident occurred, first, because of the improper stowage of the cargo, bags of sugar, and second, because of the negligence of Dugan & McNamara Company, Inc., the third-party defendant, in unloading the cargo. It was stipulated that there was "no agreement, written or oral, between the ship and Dugan & McNamara". The decision of this court is based upon the absence of contractual privity between Waterman and Dugan & McNamara though it appears to be conceded that if there were a contractual relation between them indemnity might be had by Waterman. See Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956), and Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U.S. 563 (1958).

In the decision of the Supreme Court in Crumady v. The J. H. Fisser, 358 U.S. 423, 428-429 (1959), Mr. Justice Douglas stated: "We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform [fol. 289] services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, §133. Moreover, as we said in the *Ryan* case [cited *supra*], 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U.S. at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133-134. See *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050.

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over."

I can perceive no merit to the distinction attempted to be made by the majority that the proceeding in Crumady was *in rem* against the vessel and that the evidence showed that the shipowner had chartered the vessel to an operator who had contracted with the stevedoring company to unload it. Crumady shows that Waterman by way of the third-party beneficiary contract, was entitled to the warranty of workmanlike service that Dugan & McNamara, Inc. gave when it undertook to unload the vessel.

The judgment of the court below should be reversed.

Judge Goodrich and Judge McLaughlin join in this dissent:

GOODRICH, *Circuit Judge*, Concurring in dissent.

I agree with what Chief Judge Biggs has said in his dissent. I only want to add one idea. It seems to me that with the elimination of the necessity of contract between shipowner and stevedore, as I think the *Crumady* case decides, we may have developing here a situation in which [fol. 290] rights of shipowner against stevedore may be analyzed as growing out of a relationship between them not dependent upon contract. The stevedore comes on the ship to perform labor and he comes with the permission of the shipowner. It seems to me out of this permission and the relation established thereby there can well be a duty owed to the shipowner not to create, by the acts of the stevedore, a situation which will cause loss to the shipowner. An analogy is to be found in the duty of a person responsible for the conduct of another to be indemnified by the other for expense made in discharge of such a responsibility. See RESTATEMENT, RESTITUTION, §§ 96-99.

[fol. 291] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 12,537

JASPER KING,

vs.

WATERMAN STEAMSHIP CORPORATION, Appellant,

vs.

DUGAN & McNAMARA, INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Biggs, Chief Judge; Goodrich, McLaughlin, Kalodner, Staley, Hastie and Forman, Circuit Judges.

JUDGMENT—November 17, 1959

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

November 17, 1959

[fol. 292] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 293]

SUPREME COURT OF THE UNITED STATES

No. 697, October Term, 1959

WATERMAN STEAMSHIP CORPORATION, Petitioner,

vs.

DUGAN & McNAMARA, INC.

ORDER ALLOWING CERTIORARI—March 28, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LE COPY

IN THE

Supreme Court of the United States

October Term, 1959.

No. ~~607~~ 35

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

v.

DUGAN & McNAMARA, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

THOMAS F. MOUNT,
HARRISON G. KILDARE,
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International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

TABLE OF CASES CITED.

MISCELLANEOUS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No.

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

v.

DUGAN & McNAMARA, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Waterman Steamship Corporation, respectfully prays that a Writ of Certiorari may issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on November 17, 1959, affirm-

ing the judgment of the District Court of the United States for the Eastern District of Pennsylvania, in the appeal docketed in the said Court of Appeals as No. 12,537.

OPINIONS OF THE COURTS BELOW.

The judgment of the District Court for the Eastern District of Pennsylvania, consisting of remarks addressed to the Jury at the close of the trial by the Trial Judge in sustaining respondent's motion to dismiss, is unreported and is printed in Appellant's Appendix in the Court below at pages 263a to 268a. The opinion of the Court of Appeals filed on January 16, 1959, later withdrawn, is reported in 1959 American Maritime Cases at page 411, but not in the Federal Reporter, and appears at pages 1a to 3a in the Appendix. Chief Judge Biggs dissented (Appendix, pages 3a to 7a).

The final opinion of the Court of Appeals, filed on November 17, 1959, is unreported and appears at page 11a in the Appendix, with the dissenting opinions of Chief Judge Biggs and two other members of the court beginning at page 15a.

JURISDICTION.

Jurisdiction in the District Court was based upon diver ity of citizenship between the original plaintiff, Jasper King, and the original defendant, Waterman Steamship Corporation, as owner of the vessel on which the accident occurred which resulted in the plaintiff's injuries while he was working as a longshoreman. The shipowner then joined Dugan & McNamara, Inc., the plaintiff's stevedore employer, as third-party defendant to assert its right to indemnity on the ground that the accident had been caused by substandard performance of the stevedoring services.

Waterman Steamship Corporation having settled the injury claim with the plaintiff, the trial was limited to issues involved in the third-party action. At the close of the testimony, the Trial Judge sustained the third-party defendant's motion to dismiss, treating it as a motion for judgment under Civil Rule 50 (Appellant's Appendix 266a).

On January 16, 1959, the Court of Appeals affirmed the judgment of the lower court. This judgment was subsequently set aside and rehearing was granted to consider the force and effect of this Court's decision in *Crumady v. The Joachim Hendrik Fisser v. Nacirema Operating Co., Inc.*, 358 U. S. 423, decided on February 24, 1959.

On November 17, 1959, after reargument before the court *en banc*, judgment was entered, again affirming the judgment of the District Court, three judges dissenting.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTION PRESENTED.

May a shipowner, having paid damages to a longshoreman injured on its vessel, obtain indemnity for its loss against the stevedore whose breach of contract through substandard performance caused the injury to the longshoreman, there being no express contract between the shipowner and the stevedoring company for the unloading of the ship?

STATEMENT OF THE CASE.

The plaintiff longshoreman was injured in the hold of petitioner's vessel while employed by respondent to discharge a cargo of bagged sugar. The evidence showed that the longshoreman was struck by bags of sugar falling from the stow by reason of the fact that his employer and its representatives in charge of the work had adopted a procedure which was improper and dangerous.

The vessel had been chartered by petitioner as owner to the sugar refining company, which in turn had contracted through its Philadelphia subsidiary with the respondent stevedore to unload the cargo (Appellant's Appendix 214a, 215a, 265a). There was no express contractual arrangement between the shipowner and the stevedoring company.

Previous to the trial, petitioner had settled the plaintiff's injury claim for a sum which respondent agreed was fair and reasonable (Appellant's Appendix 57a, 66a, 67a, 264a).

After both parties had presented their testimony, the Trial Judge sustained respondent's motion to dismiss, treating it as a motion for judgment under Civil Rule 50 (Appellant's Appendix 268a), on the ground that there was no right of indemnity without an express contract having been entered into between the shipowner and the stevedore (Appellant's Appendix 266a).

The petitioner appealed, and the first argument thereon was heard by the Court of Appeals on June 10, 1958. By request of the court the appeal was re-argued before the court *en banc* on December 1, 1958. In a per curiam opinion, the court affirmed the court below solely on the ground that no indemnity could be allowed because "any obligation of a stevedoring company to indemnify a ship for shipboard injury of its employees in the course of their employment must be bottomed on agreement between the parties, express or implied."

Chief Judge Biggs, dissenting, stated that on the evidence the jury "would have been entitled to find, as contended by Waterman, that the 'direct, proximate, active and substantial cause of the accident' was the negligence of the stevedoring company," and that "indemnity for the shipowner need not necessarily be based on an express contract between the shipowner and the stevedoring company."

Thereafter, this Court reversed the Third Circuit in *Crumady v. The Joachim Hendrik Fisser v. Nacirema Operating Co., Inc., supra.*

The Court of Appeals then set aside the judgment herein, withdrew the first opinion upon petitioner's motion for rehearing, and heard reargument before the court *en banc* to consider the effect of the *Crumady* decision upon the present appeal (Appendix 9a).

On November 17, 1959, the Court of Appeals decided, with the Chief Judge and two other members of the court dissenting, that the *Crumady* decision did not alter the requirement of contractual privity between the shipowner and the stevedore.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Decision Conflicts With the Applicable Decisions of This Court.

The decision of the Third Circuit in this case directly conflicts with the decision of this Court in the *Crumady* case, which held that the shipowner was entitled to indemnity against a stevedoring company without privity of contract.

In *Crumady*, as here, the services of the stevedoring company had been contracted for by someone other than the shipowner. This Court found that the shipowner was entitled to indemnity, stating as follows (358 U. S. at 428-429):

> "A majority of the Court ruled in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, that where a shipowner and stevedoring company entered into a service agreement, the former was entitled to indemnification for all damages it sustained as a result of the stevedoring company's breach of its warranty of workmanlike service. And see *Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563. * * *
>
> "We think this case is governed by the principle announced in the *Ryan* case. *The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not.* That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, Sec. 133. Moreover, as we said in the *Ryan* case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U. S., at 133. They

are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133-134. See *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050.

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." (Emphasis supplied.)

The Third Circuit attempts to restrict the holding of this Court in the *Crumady* case to contracts between the stevedore and the operator of the vessel. The court below stated (Appendix 14a):

"Thus, the actual holding of the Crumady case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the carriage was on such terms and conditions that the consignee was responsible for the discharge of its own goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer *in invitum*. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of con-

tribution betwen tortfeasors and not one of indemnification for breach of warranty."

This misconception of the reasoning in the *Crumady* decision disregards the position of the shipowner as third-party beneficiary. Nothing in the language used by this Court suggests an intention to limit the third-party beneficiary principle to contracts by stevedoring companies with ship operators. The *Ryan* case stressed the obligation of the stevedore to perform the contract in a workmanlike manner, allowing indemnity to the shipowner for breach of the stevedore's warranty of workmanlike service. In *Crumady,* the Court applied the analogy of the manufacturer's warranty to the stevedore's obligation, without regard to privity of contract. The Third Circuit in declining to acknowledge that the privity doctrine has been rejected has misapplied the *Crumady* decision by attempting to limit its scope.

Nor may the two cases be distinguished on the ground that the action in *Crumady* was against the vessel in rem, since the shipowner, whether he is sued in personam or defends as claimant of the vessel in a suit in rem, sustains like damages in either case as the result of the stevedoring company's breach of warranty.

The Third Circuit erred in concluding that the shipowner and the stevedoring company in this case were "strangers" and that petitioner is, in effect, a joint tortfeasor barred from recovery of contribution. Rather than representing a "prohibited misuse of the concept of indemnity to obtain contribution" as found by the court below, this case is identical in principle with the *Crumady* case.

The concept of a shipowner as "stranger" to the stevedore who discharges the cargo from his vessel, requiring the stevedore to make use of the ship's equipment and generally perform one of the traditional duties of the crew, cannot be accepted. Although the stevedore may not con-

tract directly with the shipowner, he does not come aboard the vessel as a trespasser. Someone having a direct interest in the business of the vessel has contracted for the stevedoring services, and whether the contract was made by the shipowner, the ship's operator, or the consignee of the cargo, the work of the stevedore is ultimately for the benefit of both the shipowner and himself. He comes aboard with the same authority to carry out the work as though the shipowner had directly contracted for the work and requested him to perform the services in a safe, proper and workmanlike manner.

The present decision accordingly conflicts with the decision of this Court in the *Crumady* case, and should be reversed.

II. The Decision Has Decided an Important Question of Federal Law Which Should Be Decided by This Court.

The shipowner's absolute and non-delegable duty to furnish a seaworthy vessel and equipment imposes a unique and burdensome form of liability without fault. The shipowner, or the vessel in rem, are liable not only for furnishing unseaworthy gear to workmen, but may become liable for injuries to shore workmen caused by defective equipment brought aboard by their own employer, *Alaska Steamship Co. v. Petterson*, 347 U. S. 396 (1954), and for misuse of seaworthy equipment by longshoremen, *Grillea v. United States*, 232 F. 2d 919 (C. A. 2, 1956). As the orbit of liability increases, there is a corresponding increase of instances where the absolute liability of the vessel or shipowner for injuries caused by unseaworthiness is due entirely to the fault or acts of others.

The position of the shipowner is exceptional from the standpoint of his lack of actual control over the circumstances which create his liability. Merchant vessels are commonly placed by charter under the control of others than the shipowner, and charterers often transfer control

and management of their ships to one or more subcharterers. Foreign owners may have no direct contact with the physical operation of their ships in American ports for months at a time.

Such special relationship of the shipowner to his vessel often places him at an extreme disadvantage in dealing with claims of injury to shore workers arising from unseaworthiness, particularly when such claims are due to the substandard performance of shore contractors whom the shipowner did not employ, and with whom he had no contractual privity. To deny indemnity in these situations is unjust and unreasonable. The shipowner is fairly entitled to indemnity by virtue of his peculiar position under his warranty of seaworthiness which imposes liability without fault.

If the decision of the court below is to stand, two identical ships at adjacent piers, employing the services of the same stevedore for loading or discharging the same type of cargo, sued by longshoremen for injuries resulting from identical conduct constituting breach of the stevedore's warranty of workmanlike service, would be allowed or denied indemnity solely upon the question of privity of contract. If the shipowner or operator of one ship had engaged the services of the stevedore, indemnity would be allowed. If the consignee of the cargo on the other ship had engaged the services, indemnity would be denied. This result is neither just nor realistic, and the decision in the *Crumady* case does not support it.

Until this Court reversed the Third Circuit in the *Crumady* case, it was the unquestioned law in this circuit that shipowners could not obtain indemnity from shore contractors under any circumstances of loss without direct contractual privity with the party at fault. The language of the *Crumady* decision seems clearly intended to extend indemnity rights to shipowners without privity of contract, on the ground that they were within the "zone of law that recognizes rights in third-party beneficiaries." 358 U. S.

at 584. The present decision, reached during the same year, creates confusion and doubt regarding the intended scope of the principle of the *Crumady* case.

The question here presented is a matter of extreme importance in the active field of maritime litigation, and should be settled by this Court.

CONCLUSION.

A writ of certiorari should be granted in accordance with the prayer of this petition.

Respectfully submitted,

THOMAS F. MOUNT,
HARRISON G. KILDARE,
J. WELLES HENDERSON,
Counsel for Petitioner.

Dated: Philadelphia, Pennsylvania
February 4, 1960

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING

v.

WATERMAN STEAMSHIP CORPORATION,
DEFENDANT AND THIRD-PARTY PLAINTIFF,
Appellant

v.

DUGAN & McNAMARA, INC., THIRD-PARTY DEFENDANT,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 10, 1958

Reargued December 1, 1958

Before: BIGGS, *Chief Judge;* MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 16, 1959)

PER CURIAM:

This is an appeal by a third-party plaintiff, defendant to the original negligence claim, from a decision that as a matter of law it is not entitled to be indemnified by the appellee, against which it has made the present third-party claim.

It is admitted that appellant, a shipowner, has paid damages to the original plaintiff, a stevedore, for shipboard injuries caused in part by the improper stowage of cargo. Appellant concedes its absolute liability to the injured stevedore for the hurtful consequences of this unseaworthy condition. However, appellant claims indemnity from the appellee, the stevedoring company which employed the injured man, on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was.

How this case might have stood had the shipowner employed the stevedoring company to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation between shipowner and stevedoring company. Rather, as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Thus, whatever arrangement was made for unloading the cargo,[1] the shipowner was not party to it and claims no benefit under it.

The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim Any obligation of a stevedoring company to indemnify a ship for shipboard injury of its employees in the course of their employment must be bottomed on agreement between the parties, express or im-

1. It was stated to us in argument and mentioned by the court below in directing a verdict against the third-party claim that the stevedoring company had been employed by the owner of the cargo to unload it. But no evidence was introduced concerning this matter and counsel for the appellant stated to the court below that the particular contractual arrangement under which the unloading was performed was not material to the third-party claim.

plied in fact. We have so stated in *Brown v. American-Hawaiian S. S. Co.*, 3d Cir. 1954, 211 F.2d 16, 18 and *Crawford v. Pope & Talbot, Inc.*, 3d Cir. 1953, 206 F.2d 784, 793. We adhere to that view of the matter.

The judgment will be affirmed.

BIGGS, *Chief Judge*, dissenting.

Deeming the evidence to be insufficient to support a finding that the ship's cargo-loading gear which broke injuring the longshoreman was unseaworthy, this court in Crumady v. The Joachim Hendrik Fisser, 249 F.2d 818, 821 (1957), cert. granted 357 U.S. 903 (1958), stated that for that reason, "[W]e do not reach the substantial question raised by the impleaded respondent [the stevedoring company] whether there would have been legal basis for making it an indemnitor, had the ship's liability been sustained." In Crumady there was no express contract, written or oral, between the shipowner and the stevedoring company for the unloading of the vessel. 142 F.Supp. 389 (D.N.J. 1956); at p. 401. In the instant case there was no express contract, written or oral, for the unloading of the ship between the shipowner, Waterman, and the stevedoring company, Dugan and McNamara, Inc., the latter company having unloaded the vessel perhaps because of an "understanding" with the shipowner, Waterman.[1] "The

1. Apparently there was no express contract, oral or written, for the unloading of the vessel. It should be noted, however, that paragraph 5 of the injured longshoreman's complaint alleges that Dugan and McNamara, Inc. was employed to discharge the cargo "by virtue of authority from and an understanding entered into" by Dugan and McNamara, Inc. with the vessel's "owner", alleged to be Waterman. Waterman's answer to the longshoreman's complaint, paragraphs 2 and 3, admitted the allegations of paragraph 5 of the complaint with an immaterial qualification. The amended third-party complaint is silent as to any contract or "understanding" for the unloading of the vessel. The second defense of the amended answer to the third-party

substantial question" referred to by this court in Crumady is before us in the instant case. It is whether the shipowner may recoup its loss against the stevedoring company if that company's negligence caused the injury to the longshoreman, there being no express contract for the unloading of the ship entered into by the shipowner and the stevedoring company.

In so stating I am not unmindful of the ruling of this court in Hagans v. Farrell Lines, 237 F.2d 477 (1956), that neither indemnity nor contribution can be recovered by the shipowner from the stevedoring company where the shipowner's negligence has concurred with that of the stevedoring company in causing the accident. As was stated in the dissenting opinion in Hagans, 237 F.2d at p. 483, the decision of this court in that case unduly limited the scope of Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), and was in apparent conflict

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complaint denies that "there is any contract upon which indemnity may be founded".

A stipulation entered into by counsel for Dugan and McNamara, Inc. and counsel for Waterman, transcript p. 296, in the form of question and answer given at sidebar during the trial was as follows: Counsel for Dugan and McNamara, Inc. stated to counsel for Waterman, "I think you will concede there was no agreement, written or oral, between the ship and Dugan and McNamara." Counsel for Waterman replied, "There was no contract between Dugan and McNamara and the Waterman Steamship Corporation, that is correct." Counsel for Dugan and McNamara, Inc. then said, "Oral or written." Counsel for Waterman replied, "I agree to that. That is right. We concede that, though we of course deny its materiality under the cases."

The nature of the arrangement for the unloading of the vessel is far from plain on this record but the pleading and the statements of counsel may express the view that even though there was no contract, oral or written, there was nonetheless an "understanding" between Waterman and Dugan and McNamara, Inc. that Dugan and McNamara, Inc. would unload the vessel but that such an understanding could not support indemnity. For the reasons set out at a later point in this opinion I think it is immaterial that there was no express contract, written or oral.

with American President Lines v. Marine Terminal Corp., 234 F.2d 753 (9 Cir. 1956), cert. den. 352 U.S. 926 (1956).[2]

I think, however, that the Hagans doctrine, even assuming its soundness, is inapplicable under the pleadings and the evidence in the case at bar for the jury would have been entitled to find, as contended by Waterman, that the "direct, proximate, active and substantial cause of the accident" was the negligence of the stevedoring company. I cannot conclude that the decision of the Supreme Court in Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282 (1952), would prevent recovery by the shipowner if the stevedoring company's negligence was the direct, active, proximate and substantial cause of the longshoreman's injury. If the jury should so find, no principle of contribution necessarily would be involved for the law would then require no division of damages between the shipowner and the stevedoring company. Indemnity arises from a contract, express or implied, and enforces a duty on the wrongdoer to respond for damages. Thomas v. Malco Refineries, Inc., 214 F.2d 884, 885 (10 Cir. 1954). See Brown v. American-Hawaiian S.S. Co., 211 F.2d 16, 18 (3 Cir. 1954). Cf. the circumstances and the decision in Crawford v. Pope & Talbot, Inc., 206 F.2d 784, 793 (3 Cir. 1953). I had thought that the independent right to indemnity was established in this circuit by the decision in the case last cited. We point out also that in Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563, 569 (1958), the Supreme Court stated: "[W]e believe sound judicial administration requires us to point out that in the area of contractual indemnity an

2. It should be noted that the case at bar was heard before the court en banc as was the Hagans case and for this reason the present writer believes that a dissent should be recorded not only in the instant case but also to the fundamental principle involved in the majority opinion in Hagans and open for reconsideration here since a court en banc sat to adjudicate the instant case. As to possible rejection of this court's view in Hagans by the Supreme Court, see the illuminating opinion of Judge Hoffman in Ravel v. American Export Lines, 162 F. Supp. 279, 288 (E.D. Va. 1958).

application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate.", citing Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., *supra.*

Last, indemnity for the shipowner need not necessarily be based on an express contract between the shipowner and the stevedoring company. When a stevedoring company goes on a ship to unload it the stevedoring company represents in substance to the shipowner that the unloading will be done with reasonable care and in a reasonably safe manner under the circumstances. The stevedoring company may be deemed to offer a unilateral contract to the shipowner saying in substance: "If you will permit me to come upon your ship and unload it I will use reasonable care in the unloading." The shipowner accepts the offer by making its ship available. Such an arrangement or contract was in effect between the shipowner and the stevedoring company in Hagans, creating what was described there as a "relational duty", 237 F.2d at p. 481. As was stated in the majority opinion in Brown v. American-Hawaiian S.S. Co., *supra,* 211 F.2d 16, n.4 cited to the text at p. 18: "It is difficult to conceive of a situation where there is no contract, either express or implied, between an employer whose men are aboard or about a vessel and the owner or charterer of such vessel." I think it is impossible. Cf. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., *supra,* 350 U.S. at pp. 132-135.

Although the record does not reveal how Dugan and McNamara, Inc. came on board the vessel, some person must have engaged that company for stevedoring. Even if we were to assume that the consignee, or consignor, or some disinterested stranger, had hired Dugan and McNamara, Inc. to unload the cargo, a relationship, contractual in nature, would have arisen whereby Dugan and McNamara, Inc. would have been obligated to indemnify Waterman for damages which Waterman had sustained by reason of Dugan and McNamara, Inc.'s failure to unload the vessel as its duty requires. Under the assumed

circumstances Waterman could be deemed to be a third-party beneficiary of the contract made by the consignee or the consignor with Dugan and McNamara, Inc. for the unloading.

Or if it be the fact, as it asserted, that there was no express contract, written or oral, Dugan and McNamara, Inc.'s obligation to indemnify Waterman could be held to be one of *implied assumpsit.*[3] Certainly it should not be assumed that Dugan and McNamara, Inc. came upon the vessel by accident and accidentally unloaded it and there is evidence tending to prove that the longshoreman was injured because Dugan and McNamara, Inc. failed in its duty.

Clearly there were issues here involved as to the respective liabilities of the parties, Waterman and Dugan and McNamara, Inc., which should have gone to the jury with proper instructions. See again Weyerheuser S.S. Co. v. Nicirema Co., *supra,* 355 U.S. at p. 568.

For the reasons stated I respectfully dissent.

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3. At common law assumpsit was implied where an undertaking was presumed to have been made by a party from his conduct although he had made no express promise. If there was a breach of contract in the performance the performer was held liable, *ex contractu.* Moses v. Macferlan, 97 Eng. Rep. 678 (1760). See also *Corpus Juris Secundum* Vol. 42, *Indemnity,* Section 21, pp. 596-597 and the dissenting opinion of Judge Goodrich in P. Dougherty Co. v. United States, 207 F.2d 626, 651 (1953), citing Dean Ames, writing in 2 Harv. L. Rev. 1 on "The History of Assumpsit", set out on page 2. See also Revel v. American Export Lines, referred to in note 2, *supra,* 162 F. Supp. at pp. 286-287.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING

v.

WATERMAN STEAMSHIP CORPORATION,
Appellant,

v.

DUGAN & McNAMARA, INC.

Present: BIGGS, *Chief Judge*, and GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges.*

ORDER.

Upon consideration of the motion filed by appellant on February 27, 1959 in the above-entitled case,

It is ORDERED that leave be, and it hereby is granted appellant to file a petition for rehearing out of time on or before March 26, 1956;

It is further ORDERED that the issuance of the mandate of this Court be stayed until further order of this Court.

By THE COURT,

WILLIAM H. HASTIE
Circuit Judge

March 10, 1959

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING

v.

WATERMAN STEAMSHIP CORPORATION,
(DEFT. AND 3D-PARTY PLTF.),
Appellant,

v.

DUGAN & McNAMARA, INC.
(3D-PARTY DEFT.)

Present: BIGGS, *Chief Judge;* and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges.*

ORDER.

Upon consideration of the petition for rehearing and of the answer thereto, in the above entitled case,

It is ORDERED that the judgment of this Court entered January 16, 1959 be and it is hereby vacated and that the Per Curiam and dissenting opinion filed January 16, 1959 be and they are hereby withdrawn;

It is Further ORDERED that the parties may file supplemental briefs as to the effect of the decision by the Supreme Court of the United States in *Crumady, Petitioner v. "Joachim Hendrik Fisser", etc. Petitioner v. Nacirema Operating Co., Inc.,* No. 62, October Term 1958, on the issues in the above entitled case;

It is Further Ordered that decision is reserved as to whether and when oral argument is to be had.

By THE COURT:

William H. Hastie
Circuit Judge

Dated:
April 7, 1959

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING

v.

WATERMAN STEAMSHIP CORPORATION,
Defendant and Third-Party Plaintiff,
Appellant

v.

DUGAN & McNAMARA, INC.,
Third-Party Defendant,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 10, 1958

Reargued December 1, 1958

Reargued October 5, 1959

Before: BIGGS, *Chief Judge;* GOODRICH, McLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 17, 1959)

By HASTIE, *Circuit Judge.*

This is an appeal by a third-party plaintiff from a decision that as a matter of law it is not entitled to be in-

demnified by the appellee, against which it has made the present third-party claim. The appeal, originally argued before a division of this court, has been reargued twice before the court en banc. We ordered the second reargument so that the parties might fully present their views concerning the force and effect of the decision of the Supreme Court in *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, decided February 24, 1959, after the first reargument. This second reargument has also permitted Judge Forman, who has joined us since the first reargument, to participate in the decision of a doubtful question of importance which has divided us.

In the court below appellant shipowner, Waterman Steamship Co., was both defendant to the original maritime tort claim of a stevedore for shipboard injury and third-party plaintiff claiming indemnity from appellee, Dugan & McNamara, Inc., the stevedore's employer. The shipowner now appeals from a decision that it is not entitled to indemnity from the stevedoring company for an amount it has paid in satisfaction of the stevedore's principal claim. In the present posture of the litigation it must be and is admitted that the stevedore's injuries were caused in part by improper stowage of cargo. Appellant concedes its absolute liability to the injured stevedore for the hurtful consequences of this unseaworthy condition. However, appellant claims indemnity from the stevedoring company on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was.

How this case might have stood had the stevedoring company been employed by the owner or operator of the ship to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation or undertaking as the basis of the alleged liability. Rather,

as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Whatever arrangement was made for unloading the cargo,[1] the shipowner was not party to it and on the present record claims no standing under it.

The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. We have said as much in *Brown v. American-Hawaiian S.S. Co.*, 3d Cir., 1954, 211 F.2d 16, 18 and *Crawford v. Pope & Talbot, Inc.*, 3d Cir., 1953, 206 F.2d 784, 792. Any obligation of a stevedoring company to indemnify a shipowner for shipboard injury of its employees in the course of their employment must be bottomed on a promise, express or implied in fact, of the stevedoring company. Otherwise, tort liability would be imposed upon the stevedoring company for negligent injury of its employee, a result prohibited by the Longshoremen's and Harbor Workers' Act. However, it is strongly urged that the Supreme Court in *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, has rejected the reasoning and impaired the authority of the *Brown* and *Crawford* cases. That contention is our principal concern here.

In the *Crumady* case the Supreme Court reviewed a decision of this court. We had not adjudicated the question of indemnity because it had been our view that there was no liability on the principal claim. However, the Supreme Court reversed us on the principal claim and then considered and sustained the indemnity claim. Thus, in considering what the Supreme Court said and did in the *Crumady* case we deal with an entirely familiar record.

---

1. It was stated to us in argument and mentioned by the court below in directing a verdict against the third-party claim that the stevedoring company had been employed by the owner of the cargo to unload it. But no evidence was introduced concerning this matter and counsel for the appellant stated to the court below that the particular contractual arrangement under which the unloading was performed was not material to the third-party claim.

Crumady was a libel in rem against a vessel by a stevedore who had been injured in unloading cargo. The ship impleaded the stevedoring company which had undertaken the unloading operation and had employed the principal plaintiff. The evidence showed that the shipowner had chartered the vessel to an operator who had contracted with the stevedoring company to unload the vessel. In these circumstances the Supreme Court ruled that "[t]he warranty [of workmanlike service] which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not." 358 U.S. at 428. The court added that the circumstances under consideration suffice "to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries". *Ibid.* Thus, the actual holding of the *Crumady* case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the carriage was on such terms and conditions that the consignee was responsible for the discharge of its own goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer *in invitum*. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of contribution between tortfeasors and not one of indemnification for breach of warranty. And the Supreme Court has clearly ruled that in these stevedore

injury cases the shipowner may not require contribution from the stevedoring company. *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 1952, 342 U.S. 282.

We find no indication that the Supreme Court in the *Crumady* case intended to abrogate or disregard the distinction between a permitted recovery-over based on contract and a prohibited misuse of the concept of indemnity to obtain contribution from a tortfeasor who enjoys the protection of the Longshoremen's and Harbor Workers' Act. We cannot square a recovery in this case with adherence to that distinction.

The judgment will be affirmed.

BIGGS, *Chief Judge*, dissenting.

The record shows that the accident to King, the longshoreman whose claim against Waterman Steamship Corporation, the third-party plaintiff-appellant, was reasonably compromised by it, was caused by two factors. The accident occurred, first, because of the improper stowage of the cargo, bags of sugar, and second, because of the negligence of Dugan & McNamara Company, Inc., the third-party, defendant, in unloading the cargo. It was stipulated that there was "no agreement, written or oral, between the ship and Dugan & McNamara". The decision of this court is based upon the absence of contractual privity between Waterman and Dugan & McNamara though it appears to be conceded that if there were a contractual relation between them indemnity might be had by Waterman. See Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956), and Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U.S. 563 (1958).

In the decision of the Supreme Court in Crumady v. The J. H. Fisser, 358 U.S. 423, 428-429 (1959), Mr. Justice Douglas stated: "We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform

services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case [cited *supra*], 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U.S. at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133-134. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050.

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over."

I can perceive no merit to the distinction attempted to be made by the majority that the proceeding in Crumady was *in rem* against the vessel and that the evidence showed that the shipowner had chartered the vessel to an operator who had contracted with the stevedoring company to unload it. Crumady shows that Waterman by way of the third-party beneficiary contract, was entitled to the warranty of workmanlike service that Dugan & McNamara, Inc. gave when it undertook to unload the vessel.

The judgment of the court below should be reversed.

Judge Goodrich and Judge McLaughlin join in this dissent.

GOODRICH, *Circuit Judge*, Concurring in dissent.

I agree with what Chief Judge Biggs has said in his dissent. I only want to add one idea. It seems to me that with the elimination of the necessity of contract between shipowner and stevedore, as I think the *Crumady* case decides, we may have developing here a situation in which

rights of shipowner against stevedore may be analyzed as growing out of a relationship between them not dependent upon contract. The stevedore comes on the ship to perform labor and he comes with the permission of the shipowner. It seems to me out of this permission and the relation established thereby there can well be a duty owed to the shipowner not to create, by the acts of the stevedore, a situation which will cause loss to the shipowner. An analogy is to be found in the duty of a person responsible for the conduct of another to be indemnified by the other for expense made in discharge of such a responsibility. See RESTATEMENT, RESTITUTION, §§ 96-99.

IN THE

Supreme Court of the United States

October Term 1959

No. ~~607~~ 35

WATERMAN STEAMSHIP CORPORATION, *Petitioner*

v.

DUGAN & McNAMARA, INC., *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term 1959

No.

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v.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE BY RESPONDENT

This is a brief in opposition to a Petition for Writ of Certiorari by the Waterman Steamship Corporation, hereinafter designated Petitioner, the original Defendant and Third Party Plaintiff, directed to the United States Court of Appeals for the Third Circuit which affirmed a final judgment entered by the United States District Court for the Eastern District of Pennsylvania, Clary, District Court Judge, in favor of Dugan & McNamara, Inc., Third Party Defendant, hereinafter designated Respondent. The judgment was entered pursuant to a motion for a directed verdict under F. R. C. P. 50.

The original Plaintiff, Jasper King, a longshoreman, sustained injuries when a vertical column of sugar bags about seven feet high collapsed while he and his fellow employees were discharging cargo aboard the *SS. Afoundria* while berthed in the Port of Philadelphia, Pennsylvania, U. S. A., on October 9, 1952. The sugar bags had been stowed in San Carlos, Negros Island, in the Philippines, by a stevedore of the ship, unrelated and unconnected in any way with the instant Respondent stevedore, about thirty-five days prior to the time the original Plaintiff, Jasper King, was injured. The bags, which contained raw sugar, were about three feet long and eighteen to twenty-four inches wide. When laid flat they were approximately fifteen inches thick. The bags were stowed parallel and ran athwartship.

In the original Complaint by Jasper King against the Petitioner, he alleged, inter alia, that his injuries were caused by the unseaworthiness of the *SS. Afoundria* and the negligence of her crew resulting from an unseaworthy or unstable stow which denied him a reasonably safe place in which to work. (App. 5a)

Specifically, it was alleged by Jasper King, longshoreman, original Plaintiff, that the Petitioner

> "allowed and permitted said cargo of sugar to be stowed in such a negligent and careless manner as to constitute a danger to plaintiff and other workmen unloading said cargo" and "failing to warn the plaintiff and other workmen of the dangerous and defective stowage of the cargo of sugar" and "permitting plaintiff and other workmen to commence unloading operations in a dangerous place of employment." (App. 5a)

The Petitioner, as Third Party Plaintiff, filed an Amended Third Party Complaint in which Petitioner alleged, inter alia,

> "While Jasper King and others were removing bags from a location about six feet aft of the forward

bulkhead, one or more bags fell from the top of one tier and struck Jasper King, causing the various severe personal injuries mentioned in the complaint. The only condition attributable to the vessel which could have been material in connection with this accident was the placing or shifting of a bag at or near the bottom of the exposed tier in such a position that the bags above it would not be firmly supported when reached by the longshoremen, which condition must have existed in order to produce the aforesaid accident under the circumstances disclosed by investigation. The said unstable, unsafe, and to that extent unseaworthy, condition of the stowed bags would not have resulted in the aforesaid accident except for the direct, primary and substantial negligence of the third-party defendant's employees in breaking down the stowed bags to an unsafe depth and thereby causing the tier to become exposed without safe, reasonable and adequate lateral support, which condition was or should have been known to third-party defendant, its representatives, supervisors, foremen and longshoremen." (App. 10a, 11a)

To the Amended Third Party Complaint the Respondent filed an Answer in which some of the averments of the Amended Third Party Complaint are admitted. It is specifically averred that the "manner and methods in which the bags were stowed caused the vessel to be unseaworthy and was the underlying cause of the accident." (App. 13a)

As a separate and distinct defense, the Respondent averred that it was, at the time of this accident, the employer of the original Plaintiff, Jasper King; that the accident which is the subject matter of the litigation occurred under circumstances making the Third-Party Defendant (Respondent) responsible to the original Plaintiff, Jasper King, for benefits under the Longshoremen's and Harbor Werkers' Act, as amended, 33 U. S. C. A. §901 et seq. Section 5 of said

Statute, 33 U. S. C. A. §905, provides that upon payment of compensation under the provisions of the said Statute the Respondent-stevedore, Third Party Defendant, was, and is, discharged of all liability to the Plaintiff or any other parties otherwise entitled to bring suit against Respondent-stevedore. The Respondent further specifically averred that the benefits under said Longshoremen's and Harbor Workers' Act were tendered to and accepted by the original Plaintiff, Jasper King. The Respondent claimed the said Statute was a complete defense under the circumstances to the Amended Third Party Complaint of the Petitioner (App. 14a).

The Respondent specifically averred that there was no contract between the Petitioner and Respondent (App. 14a). The Respondent further specifically pleaded as a defense that the Petitioner failed to state any ground for relief and failed to set forth any cause of action against the Respondent upon which relief could be granted (App. 15a).

During the filing of pleadings and after an investigation by the Petitioner, it paid by way of settlement to Jasper King the sum of $6,800.00, with no agreement from Respondent that Petitioner was legally liable under the law to make such payment, but with the agreement that the sum paid represented a fair figure of settlement, assuming that liability of the Petitioner existed.

It was, and is, conceded by the Petitioner that the original Plaintiff, Jasper King, a longshoreman, accepted and received benefits and medical payments in accordance with the provisions of the Longshoremen's and Harbor Workers' Act, supra.

Since the filing of the Petition, the second written decision of the United States Court of Appeals for the Third Circuit, sitting en banc, affirming the position of Respondent, has been reported in 272 F. 2d 823.

COUNTER STATEMENT OF THE QUESTIONS INVOLVED

I. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, overrule its prior decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* (1952), 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

II. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, strike down the force and effect, absent a contractual warranty, of section 905 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., §901 et seq.?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

III. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, reject overrule or impair the force and effect of the reasoning of the United States Court of Appeals for the Third Circuit in *Brown v. American-Hawaiian Steamship Company* (3d Cir., 1954), 211 F. 2d 16, and *Crawford v. Pope & Talbot* (3d Cir., 1953), 206 F. 2d 784?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

IV. If any or all of the answers to the first three questions is or are YES, then the question is

> May a shipowner sued in a diversity civil action recover indemnity from an independent stevedoring contractor where neither the shipowner nor the ship are responsible for the discharge of the cargo at the port of discharge, are not responsible and do not pay for such discharging, are both strangers to the contract entered into by the stevedoring company, and neither are in privity of contract, either express or implied in fact?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

V. Where admittedly the stowage of the cargo by the ship was faulty, may a shipowner recover indemnity from a stevedoring company which went aboard the ship as a permittee of the ship operator and an invitee of the consignee as owner of the cargo, where the consignee, as owner of the cargo, on its own behalf and for its own benefit, made the agreement with the stevedoring company to discharge the cargo and to use special equipment and pier under the control of the cargo owner in such discharge.

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

The above questions will be discussed seriatim.

ARGUMENT

QUESTION NO. I

The majority opinion of the United States Court of Appeals for the Third Circuit, 272 F. 2d 823, at p. 826, stated their conclusions with respect to the first question as follows:

> "Thus, the actual holding of the Crumady case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the carriage was on such terms and conditions that the consignee was responsible for the discharge of its own goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer in invitum. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of contribution between tortfeasors and not one of indemnification for breach of warranty. And the Supreme Court has clearly ruled that in these stevedore injury cases the shipowner may not require contribution from the stevedoring company. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 1952, 342, 72 S. Ct. 277, 96 L. Ed. 318."

Justice Black, speaking for the Supreme Court of the United States in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* (1952), 342 U. S. 282, at page 285 stated (footnotes omitted):

> "In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. This judicial attitude has provoked protest on the ground that it is inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone else. Others have defended the policy of common-law courts in refusing to fashion rules of contribution. To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.
>
> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act Congress has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by the creation of a statutory schedule of compensation. The Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act (41 Stat 1007, 46 USC §688), the Public Vessels Act (43 Stat 1112, 46 USC §§781-790), the Limited Liability Act (RS §4281, as amended, 46 USC §§181 et seq.) and the Harter Act (27 Stat 445, 46 USC §§190-195). Many groups of

persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit. Apparently insurance companies are opposed to such a change. Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

"In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so."

With respect to the holding in the *Crumady* decision, supra, it should be pointed out that the majority opinion of the Supreme Court makes it clear and it so stated that its decision was based upon *Ryan Stevedoring Co., Inc., v. Pan-Atlantic Steamship Corporation* (1956), 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133. Justice Douglas, speaking for the majority of this court in the *Crumady* case, stated:

"We think this case is governed by the principle announced in the Ryan case", 358 U. S. 423, 428, 3 L. Ed. 2d, 413, 417.

The *Ryan* case did not hold that an operator of a ship, the owner of a ship, the charterer of a ship, the agent of a ship, or the ship itself could recover indemnity on the basis of a tort or in disregard of the exclusionary effect of the Harbor Workers' Act, upon the right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor.

The Supreme Court in the *Ryan* case points clearly to the effect that the shipowner's responsibility is based upon a breach of warranty, 350 U. S. 124, 132. The Court specifically stated that the steamship owner in that case "relies entirely upon petitioner's [Ryan Stevedoring Company] contractual obligation," and "we [the Supreme Court of the United States] do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right."

The majority opinion further stated:

"The ship owner's claim here also is not a claim for contribution from a joint tortfeasor. Consequently, the considerations which led us to the decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitt ng Corp.*, 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277, are not applicable."

The force and effect to be given to this statement of the majority opinion of the Supreme Court in the *Ryan* case is best pointed up by the dissenting opinion written by Mr. Justice Black, in which he was joined by the Chief Justice, Mr. Justice Douglas and Mr. Justice Clark. It will be observed upon a cursory examination of the *Ryan* case that that decision was not based upon the absence of the contractual obligation and was not based upon a ruling to strike down the force and effect of the Harbor Workers' Act, absent a contractual warranty implied by law.

It would appear to be clear that where the Supreme Court in the majority opinion of the *Ryan* case expressly stated that its decision was not based upon absence of contract and that it did not reach the exclusionary effect of the Compensation Act, that such was its reasoning. Therefore, when this Court subsequently, as it did in the *Crumady* case, stated that such subsequent decision was based upon the *Ryan* case, it does not seem logical, warranted or necessary to place a meaning upon such later decision as suggested by the Petitioner and the dissenting opinions of the Judges of Court of Appeals in this case.

QUESTION NO. II

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U. S. C. A., §905, provides:

> "Sec. 905. Exclusiveness of Liability. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment nor that the injury was due to the contributory negligence of the employee."

The majority opinion of the Third Circuit with respect to the effect of the *Crumady* decision on the above statute, declared at page 826:

> "We find no indication that the Supreme Court in the Crumady case intended to abrogate or disregard the distinction between a permitted recovery-over based on contract and a prohibited misuse of the concept of indemnity to obtain contribution from a tortfeasor who enjoys the protection of the Longshoremen's and Harbor Workers' Act. We cannot square a recovery in this case with adherence to that distinction."

QUESTION No. III

With respect to this question, the majority opinion of the Third Circuit stated (footnote omitted):

> "How this case might have stood had the stevedoring company been employed by the owner or operator of the ship to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation or undertaking as the basis of the alleged liability. Rather, as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Whatever arrangement was made for unloading the cargo, the shipowner was not party to it and on the present record claims no standing under it.
>
> "The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. We have said as much in Brown v. American-Hawaiian S.S. Co., 3 Cir., 1954, 211 F. 2d 16, 18 and Crawford v. Pope & Talbot, Inc., 3 Cir., 1953, 206 F. 2d 784, 792. Any obligation of a stevedoring company to indemnify a

shipowner for shipboard injury of its employees in the course of their employment must be bottomed on a promise, express or implied in fact, of the stevedoring company. Otherwise, tort liability would be imposed upon the stevedoring company for negligent injury of its employee, a result prohibited by the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. Sec. 901 et seq. However, it is strongly urged that the Supreme Court in Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, has rejected the reasoning and impaired the authority of the Brown and Crawford cases."

In *Brown v. American-Hawaiian Steamship Corporation* (3d Cir., 1954), 211 F. 2d 16, 18, the Court declared (footnotes omitted):

"There is, however, one aspect of the present appeal which requires further refinement. Appellant suggests that irrespective of the contractual relations between third-party plaintiff (owner) and third-party defendant (employer) in this type of suit, a right of indemnity exists where the liability of the former is secondary or passive while that of the latter is primary or active. Such a problem would be posed, for example, where the owner is held liable to a plaintiff-employe for a condition of unseaworthiness created by the employer's negligence and there is no contract, express or implied, between them, or, if such contract exists, it cannot be read to lay the groundwork for an indemnification claim. In answer to this suggestion we repeat what we thought had been made clear by the Crawford case: there can be no action of indemnity in these cases which is not based on the violation of some contractual duty. Were the rule otherwise the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act.

> Such a rule would be violative of Section 5 of the Act as well as of the spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. Cf. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 412, 74 S. Ct. 202."

In Note 6 to the *Ryan* case, supra, page 132, the Supreme Court wrote:

> "6. We do not reach the issue of the exclusionary effect of the Compensation Act upon a right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor. See Brown v. American-Hawaiian S.S. Co. (CA 3d Pa.) 211 F. 2d 16, 18; . . ."

That Court had previously, in *Crawford v. Pope & Talbot* (1953), 206 F. 2d 784, declared the same principle and the Supreme Court of the United States affirmed the same principle in *Pope & Talbot v. Hawn* (1953), 346 U. S. 406, 98 L. Ed. 143, 74 S. Ct. 202. See also page 146 of Mr. Justice Black's dissenting opinion in the *Ryan* case.

QUESTION No. IV

What has heretofore been said with respect to Questions I, II and III, and particularly with respect to Question III, is complete and adequate rejection of Question IV. It may also be appropriate that the dissenting opinion in *Crumady v. Joachim Hendrik Fisser*, supra, written by Mr. Justice Harlan and concurred in by Mr. Justice Frankfurter and Mr. Justice Whittaker be called to this Court's attention.

Mr. Justice Harlan indicated in the dissenting opinion that the opinion of this Court in *Weyerhaeuser Steam-*

ship Company v. Nacirema Operating Company (1958), 355 U. S. 563, 568, 2 L. Ed. 2d 491, 78 S. Ct. 438, was applicable to the *Crumady* case. It is clear that the reasoning of the majority opinion of the Court of Appeals for the Third Circuit believed that the reasoning in the *Weyerhaeuser* case is also applicable to the instant case. See also opinion of the Court of Appeals for the Third Circuit in *Hagans v. Farrell Lines* (1956), 237 F. 2d 477.

QUESTION NO. V

Even should this Court believe that Questions I, II, III and IV do not bar the ship owner from a recovery from the Stevedoring Company in this case, the ship owner is barred from recovery because of the fault on its own part in the improper stowage of the cargo.

The majority opinion of the Court of Appeals in this case stated:

> "However, appellant claims indemnity from the stevedoring company on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was."

The Petitioner alleged that it had improperly stowed the cargo. It conceded that such improper stowage caused the vessel to be unseaworthy. It is urged that the language of this Court, even as late as 1958, is applicable. The language is:

> "Sound judicial administration requires us [the Supreme Court] to point out that in the area of contractual indemnity an application of theories of active or passive, as well as primary or secondary negligence is inappropriate."

[Close of the opinion of this Court in *Weyerhaeuser v. Nacirena*, supra.]

It will be also noted that in the *Weyerhaeuser* case, this Court, without dissent, declared that conduct on the part of the ship or its operator could preclude recovery, 355 U. S. 563, 567.

Reverting to the opinion of this Court in the *Halcyon* case, supra, it was pointed out forcibly and correctly that the matter of whether or not a joint tortfeasor in this class of cases, absent contractual relationship, should be entitled to recover against a mutual wrongdoer should be left to the Congress. Since the decision in the *Halcyon* case, the Congress of the United States has amended the subject Act in many important matters, including additional benefits and additional rights of the injured parties to sue. The Congress of the United States has not deemed it appropriate to change the decision in this court in the *Halcyon* case. It has not deemed it appropriate to change the exclusionary section of the Act. It therefore appears that the reasoning in the *Halcyon* case should apply in this case and this Court should not now undertake legislation which it refused to undertake just a few years ago in the *Halcyon* decision.

It is not believed by the Respondent that this Court in the *Crumady* case intended to go as far as suggested by the dissenting opinions of Chief Judge Biggs and as urged by the Petitioner.

Nor is it believed correct, as suggested by Judge Goodrich, that the *Crumady* case eliminated the necessity of a contract between the ship owner, its operator and the stevedore. It is not believed that the Supreme Court is now legislating in a direction contrary to the *Halcyon* decision, wherein, as heretofore stated, such legislation is for the Congress and not for this Court.

The statement in the majority opinion in the *Crumady* case about third party beneficiaries is not applicable to the instant case. The reason for this conclusion is obvious. In

the *Crumady* case there was a stevedoring contract. The contract was a part of the record. It provided, among other things, the following:

> "This agreement, made and entered into this 30th day of December, 1953, between Insular Navigation Company as Owner, Operator, Charterer or Agent, and Nacirema Operating Co., Inc., Contractor, will govern the discharging and/or loading of vessels owned, operated or otherwise controlled by Insular Navigation Company at the Port of Port Newark, New Jersey, effective December 30, 1953, and the Contractor undertakes to faithfully furnish such stevedoring services as may be required upon such vessels as are assigned to the Contractor at the agreed rates, terms, and conditions specified below:
>
> Discharging
>
> 385,000 Board Feet Nicaraguan Pine from m. v. 'Joachaim Hendrik Fisser' scheduled to arrive Port Newark January 2."

The agreement was signed as follows:

> "Insular Navigation Co., Owner/Operator/Charterer/Agent, By: J. J. Smith
>
> Nacirema Operating Co., Inc., Contractor by Andrew G. Dantzler, Vice Pres."

Transcript of Record in the Supreme Court, 96-103.

There was no reasonable necessity for the majority opinion in *Crumady* case to write such a statement. It was and is dicta and did not belong in the case.

Ships are operated and managed through owners, operators, agents or charterers. Such is the only way that a ship may contract. The ship itself is not capable of execut-

ing an agreement or preparing or reviewing any of the terms thereof. The contract in the *Crumady* case expressly named the steamship JOACHIM HENDRIK FISSER and stated the date when the ship was scheduled to arrive in the Port of Newark. The contract, therefore, was clearly between the owner, operator, charterer or agent and the stevedoring company. The owner of the ship was expressly made a party to the contract and inasmuch as the majority opinion, as indicated above, declared that its decision was based upon the principle of the *Ryan* case which does not enunciate with respect to third party beneficiaries, such a statement by the majority opinion was not only dicta but caused, and will continue to cause, confusion and delay in the disposition of many cases in the many federal courts throughout the United States and will encourage and invite many additional suits. This Court should lay to rest the misinterpretation by the dissenting Judges in this case by denying the Petition for Certiorari.

This Court should leave the majority opinion of the United States Court of Appeals for the Third Circuit stand.

It is respectfully submitted that this Court should not legislate in a matter where Congress has previously legislated and where it would vitally affect what has been considered by many of the foremost thinkers of this country to be the greatest secondary national defense to this country, namely, shipping and those counterparts of economics, transportation, facilities, unions and parties connected therewith.

It was, and is, conceded that the development of our American Merchant Marine during World War I and following World War I convinced our American citizenry, and particularly those in charge of our national defense, of the importance of the shipping industry and those parties directly connected with and affected thereby. Many textbooks may be referred to in connection with the legislation of the Congress in re The Harter Act, the Carriage of Goods by Sea Act, Exoneration and Limitation Proceedings,

the Ship-Vessels Act, the Longshoremen's and Harbor Workers' Act, the Jones Act, etc, which indicates clearly that Congress has been, and is, giving consideration respecting legislation in re the shipping industry in the United States. In the legislative action which this Court is now urged to take the thoughts of the Director of the Merchant Marine of the United States of America are not made known to the parties to this proceeding; the ship owners themselves have not been heard nor are they being permitted to be heard; the underwriters issuing policies covering protection and indemnity insurance to the ship in connection with personal injury claims are not being consulted, nor are their views made known; the views of the casualty companies covering the public liability of stevedores is not known; the attitudes of those carrying longshoremen's compensation insurance have not been heard; the stevedore companies have not been heard; the welfare of the various maritime ports throughout the United States has not been discussed or determined; the overlapping of the insurance coverage with respect to personal injuries of persons aboard ship and that of the casualty companies for public liability of the stevedore has not been adequately placed on this record; the various interests affected by the urged legislation have not been heard; no adequate hearing as to the effect upon Merchant Marine, not only as a private industry but as a secondary national defense, has been conducted, nor has the public, which has an interest in this worldwide matter, been heard; the Department of Commerce has not been heard; the right of freedom of commercial contracts, particularly where the entire vessel is chartered, absent national emergency, is in jeopardy.

This Court in the *Ferncliff Case* (1939), 306 U. S. 444, at 448, 1939 A. M. C. 403, at 407, approved the following language:

> "The general policy of our law is freedom of contract subject only to the statute and considerations of public

interest. Where a contract stipulation is not clearly opposed to public policy it should be upheld as it is the agreement of the parties."

With utmost respect to the majority opinion in the *Crumady* case, it must be concluded that the provisions of the stevedore contract as being made "between Insular Navigation Company as owner, operator, charterer or agent . . . and the stevedoring company" governing the discharge of the *SS. Joachim Hendrik Fisser* scheduled to arrive at the Port of Newark on January 2, 1954, [Transcript of the Record in the *Crumady* case in the Supreme Court, 96-103] cannot be read other than a contract with the owner, operator, charterer or agent of the ship. It does not do justice to judicial reasoning or to judicial administrative justice to state in an opinion that the ship or its owner came within the zone of modern law of third party beneficiary by judicial fiat, whereas in fact the "owner", the "operator", the "charterer" and the "agent" of the ship were expressly named as parties to the stevedore agreement and the ship was expressly named as one of the ships governed by the agreement.

It is earnestly and respectfully urged that the administration of judicial justice requires the forthwith denial of the petition for certiorari and the memorandum denying said certiorari should state that the decision in *Crumady* did not, and was not, intended to overrule the *Halcyon Lines* case or override Section 905 of the Longshoremen's and Harbor Workers' Compensation Act and was not intended and does not impair the reasoning in *Brown v. American-Hawaiian*, supra, and *Crawford v. Pope and Talbot*, supra. The only possible reason for this Court to grant a certiorari would be so that this Court could in a full opinion lay to rest the suggested reasoning of the Petitioner and that of the dissenting Judges in this case. This Court has the power and duty in denying a petition for certiorari to make a judicial administrative statement in aid of justice and, in

order to avoid further unnecessary congestion of the dockets of the federal courts, to state unequivocally that the reasoning of the Petitioner and the dissenting Judges does not and should not flow or stem from the result of the majority of the opinion of the Court in the *Crumady* case. To hold as a general principle in this class of cases as it is urged that the *Crumady* case did hold that a ship, shipowner, charterer or subcharterer may recover ipso facto on the theory that it is a third party "beneficiary" is not only factually but legally unsound. For instance, there are many types and forms of charter parties: (1) pro hac vice; (2) time charters; (3) voyage charters; (4) agents' ship chartering operators; (5) many other and varied forms. All such charter parties may, and some do, contain different clauses in relation to the length of time in which a vessel has to discharge the cargo or the length of time the consignee has to discharge the cargo and, in the absence of discharging cargo in the specified time, "lay days" elapse and demurrage at a specified rate of thousands of dollars per day begin to accrue to the vessel. There may be certain provisions in the charter party with respect to exoneration, limitation of liability, Carriage of Goods by Sea Act and, where the charter party is for the complete and entire ship, the Courts have sustained the validity of the provisions of the charter party as between the parties which are not against public policy. There may be and are express provisions in contracts holding the ship harmless and there may be express provisions by the ship holding the cargo harmless as well as the stevedoring company. This would and could relate to damage to the ship and/or damage to the cargo and also to damage to property and to personal injuries of third parties. For a third party beneficiary, such as the petitioner urges, to have the benefit of such a contract, then such third party beneficiary should have mutual responsibilities to the promisor or maker of such contract in any respect from which the promisor or maker of the contract is damaged or hurt. Suppose, for instance, the ship did not arrive on time

or was delayed by reason of going to another port for reasons peculiar to itself, and a stevedoring company appeared with 54 employees for several days to begin the discharge of said ship. It is believed that the stevedoring contractor could recover its loss from the ship or its operator, absent a contract with it.

There are too many variables to apply the simple statement of the words "third party beneficiaries". Therefore any ship may recover indemnity in this class of cases from any stevedore regardless of the existence or non-existence of a contractual relationship between them.

It is submitted that the Petition for Certiorari should be forthwith denied.

Respectfully Submitted

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Of Counsel

IN THE

Supreme Court of the United States

October Term, 1960.

No. 35.

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

v.

DUGAN & McNAMARA, INC.,
Respondent.

BRIEF FOR PETITIONER.

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TABLE OF CASES CITED.

STATUTES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 35.

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

v.

DUGAN & MC NAMARA, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

This case comes before the Court on writ of certiorari issued to review the final judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS OF THE COURTS BELOW.

The statements of the trial judge addressed to the jury at the close of the trial in connection with granting respondent's motion for judgment under Civil Rule 50 are printed at R. 13 to 17. The Court's order for judgment appears at R. 18.

The opinion of the Court of Appeals for the Third Circuit affirming the judgment of the Court below, filed on January 16, 1959 and later withdrawn, is reported in 1959 American Maritime Cases at page 411, but not in the Federal

Reporter, and appears at R. 20 to 21. The dissent of Chief Judge Biggs is printed at R. 21 to 26.

The order of the Court of Appeals granting leave to the petitioner to file a petition for rehearing out of time appears at R. 27 and 28. The order granting petitioner's request for a rehearing, vacating the judgment entered on January 16, 1959, withdrawing the opinion and dissenting opinion then filed, and permitting the parties to file supplemental briefs as to the effect of the decision of the Supreme Court of the United States in *Crumady v. The Joachim Hendrik Fisser, et al. v. Nacirema Operating Co., Inc.*, reported at 358 U. S. 423 (1959), appears at R. 31.

The final opinion of the Court of Appeals affirming the judgment of the Court below, filed on November 17, 1959 and reported at 272 F. 2d 823 (1960), is printed at R. 32 to 35, with the dissenting opinions of Chief Judge Biggs and two other members of the court beginning at R. 36.

JURISDICTION.

The jurisdiction of this Court to review the final judgment of the United States Court of Appeals for the Third Circuit is provided in 28 U. S. C., Section 1254(1).

The final judgment of the United States Court of Appeals for the Third Circuit was entered on November 17, 1959 (R. 38). Petition for writ of certiorari was granted by this Court on March 28, 1960 (R. 39).

QUESTION PRESENTED.

May a shipowner, having paid damages to a longshoreman injured on its vessel, obtain indemnity for its loss against the stevedore whose breach of contract through substandard performance caused the injury to the longshoreman, there being no express contract between the shipowner and the stevedoring company for the unloading of the ship?

STATEMENT OF THE CASE.

The plaintiff longshoreman was injured in the hold of petitioner's vessel, Steamship ALEXANDRIA, while employed by respondent to discharge a cargo of bagged sugar. The evidence showed that the longshoreman was struck by bags of sugar falling from the stow by reason of the fact that his employer and its representatives in charge of the work had adopted a procedure which was improper and dangerous.[1]

The vessel had been chartered by petitioner as shipowner to the sugar refining company, which in turn had contracted through its subsidiary, as consignee, with the respondent stevedore to unload the cargo at Philadelphia[2] (R. 15, 35). There was no express contractual arrangement between the shipowner and the stevedoring company[3] (R. 12, 13, 21, 35).

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1. See comments of Chief Judge Biggs at R. 23 and 36.

2. This contractual relationship was disclosed during the trial to the trial judge, who accepted it as an established fact in the case in the course of his closing remarks to the jury (R. 15). Both Opinions and all Dissents in the Court of Appeals were predicated upon the existence of a contract between Dugan & McNamara, Inc., as stevedore, and National Sugar Refining Company as owner and consignee of the cargo (R. 21, 35). Respondent admits the contractual relationship in its Brief in Opposition to Petition for Writ of Certiorari, under Point V of Counter-Statement of the Questions Involved, at page 6.

3. The absence of contractual privity was stipulated during the trial in a sidebar conference (R. 12, 13). The sole question under consideration at that time was the existence of an express contract between petitioner and respondent. The Court of Appeals was incorrect in assuming, as it did, that whatever the contract arrangement may have been, "the shipowner * * * *claims no benefit under it*" (R. 21), or *"claims no standing under it."* (R. 34). Petitioner's counsel admitted that there was no contract, written or oral, between the shipowner and the stevedore, "though of course we deny its materiality under the cases." Counsel was not questioned, and did not state, whether he "claimed benefit" or "claimed standing" under the contract existing between the stevedore and the consignee of the cargo.

Previous to the trial, petitioner had settled the plaintiff's injury claim for a sum which respondent agreed was fair and reasonable (R. 14).

After both parties had presented their testimony, the trial judge sustained respondent's motion to dismiss, treating it as a motion for judgment under Civil Rule 50 (R. 17). The Court ruled as a matter of law that there was no right of indemnity without an express contract having been entered into between the shipowner and the stevedore (R. 15, 16).

The petitioner appealed, and the first argument thereon was heard by the Court of Appeals on June 10, 1958. By request of the court, the appeal was re-argued before the court *en banc* on December 1, 1958. In a Per Curiam opinion, the Court affirmed the Court below exclusively on the ground that no indemnity could be allowed as a matter of law because "any obligation of a stevedoring company to indemnify a ship for shipboard injury of its employees in the course of their employment must be bottomed on agreement between the parties, expressed or implied in fact" (R. 21).

Chief Judge Biggs, dissenting, stated that on the evidence the jury "would have been entitled to find, as contended by Waterman, that the 'direct, proximate, active and substantial cause of the accident' was the negligence of the stevedoring company," and that "indemnity for the shipowner need not necessarily be based on an express contract between the shipowner and the stevedoring company" (R. 23, 24).

Thereafter, this Court reversed the Court of Appeals for the Third Circuit in *Crumady v. The Joachim Hendrik Fisser, et al. v. Nacirema Operating Co., Inc., supra.*

The Court of Appeals then set aside the judgment herein, withdrew the first opinion and dissent upon petitioner's motion for rehearing, and heard reargument before the court *en banc* to consider the effect of the *Crumady* decision upon the present appeal (R. 31).

On November 17, 1959 the Court of Appeals decided, with the Chief Judge and two other members of the court dissenting, that the *Crumady* decision did not alter the requirement of contractual privity between the shipowner and the stevedore unless the stevedoring company, as in *Crumady*, had entered into a contract with the operator of the vessel (R. 32 to 35). The contract in the present instance having been made by the stevedoring company with the consignee of the cargo, the Court of Appeals affirmed the judgment of the Court below (R. 35).

ARGUMENT.

The Shipowner Is Justly Entitled to Benefit by the Stevedore's Warranty of Workmanlike Service Without Regard to Contractual Privity.

The principle that the shipowner is entitled to benefit by the stevedore's warranty of workmanlike service without regard to contractual privity has already been decided by this Court.

In *Crumady v. The Joachim Hendrik Fisser, et al. v. Nacirema Operating Co., Inc.*, 358 U. S. 423 (1959), the services of the stevedore had been contracted for by the charterer, as operator of the vessel. A longshoreman was injured due to substandard performance by the stevedoring company's employees, who brought into play a hazardous and unseaworthy condition of the ship's winch controls. The longshoreman recovered damages against the shipowner. This Court found that the shipowner was entitled to full indemnity from the stevedore, stating at pages 428-429 as follows:

> "A majority of the Court ruled in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, that where a shipowner and stevedoring company entered into a service agreement, the former was entitled to indemnification for all damages it sustained as a result of the stevedoring company's breach of its warranty of workmanlike service. And see *Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563. • • •
>
> "We think this case is governed by the principle announced in the *Ryan* case. *The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not.* That is enough to bring the vessel into the

zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, Sec. 133. Moreover, as we said in the *Ryan* case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U. S. at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.* at 133-134. See *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050.

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." (Emphasis supplied.)

The only factual difference between this case and the *Crumady* case is that in the present case the stevedore was engaged by the consignee of the cargo, rather than by the operator of the vessel as in *Crumady*. Such factual difference is immaterial, and indemnity should be granted to the shipowner (petitioner herein) just as it was in the *Crumady* case. The attempt of the Court of Appeals for the Third Circuit to restrict the holding of this Court in the *Crumady* case to contracts between the stevedore and an operator of the vessel is unjustified. In attempting to do so, the Court below stated (at R. 35):

"Thus, the actual holding of the *Crumady* case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the car-

riage was on such terms and conditions that the consignee was responsible for the discharge of its own goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer *in invitum*. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of contribution between tort-feasors and not one of indemnification for breach of warranty." (R. 35)

This misconception of the reasoning involved in the *Crumady* decision completely disregards the right of the shipowner as third-party beneficiary. Nothing in the language used by this Court in the *Crumady* case suggests an intention to limit the third-party beneficiary principle to contracts by stevedoring companies with ship operators. In the *Ryan* case this Court stressed the obligation of the stevedore to perform the contract in a workmanlike manner and allowed indemnity to the shipowner for breach of the stevedore's warranty of workmanlike service. In the *Ryan* case, the question of contractual privity did not arise, because the shipowner had directly engaged the services of the stevedore. In the *Crumady* case this Court again applied the analogy of the manufacturer's warranty to the stevedore's service and held that this warranty inured to the benefit of the shipowner regardless of contractual privity.

The Court of Appeals for the Third Circuit erred in failing to recognize that the privity rule had already been rejected by this Court, and then misapplied the *Crumady* decision by attempting to limit its scope.

Nor can this case and the *Crumady* case be distinguished on the ground that the action in *Crumady* was

against the vessel in rem, since the shipowner, whether he is sued in personam or defends as claimant of the vessel in a suit in rem, sustains like damages in either case as the result of the stevedoring company's breach of warranty.[4]

The Court below also erred in concluding that the shipowner and the stevedoring company in this case were "strangers" and that petitioner (shipowner) is, in effect, a joint tortfeasor barred from recovery of contribution. Rather than representing a "prohibited misuse of the concept of indemnity to obtain contribution," this case is identical in principle with the *Crumady* case.

The concept of a shipowner as "stranger" to the stevedore who discharges the cargo from his vessel, requiring the stevedore to make use of the ship's equipment and generally to perform one of the traditional duties of the crew, cannot be accepted. Although the stevedore may not contract directly with the shipowner, he does not come aboard the vessel as a trespasser. Someone having a direct interest in the business of the vessel has contracted for the stevedoring services, and whether the contract was made by the shipowner, the ship's operator, or the consignee of the cargo, the work of the stevedore is ultimately for the benefit of both the shipowner and himself. He comes aboard with the same authority to carry out the work as though the shipowner had directly contracted for the work and requested him to perform the services in a safe, proper and workmanlike manner.

Finally, in principle, irrespective of the *Crumady* case, the shipowner is entitled to indemnity from shore contractors regardless of contractual privity.

The shipowner's absolute and non-delegable duty to furnish a seaworthy vessel and equipment imposes a unique

4. Crumady sued Steamship JOACHIM HENDRIK FISSER, her engines, etc., in rem, and her owners Joachim Hendrik Fisser and/or Hendrik Fisser in personam. No service was made upon the individual respondents in personam. Upon attachment of the vessel in rem, Hendrik Fisser Aktien Gesselschaft appeared as owner and claimant.

and burdensome form of liability without fault. The shipowner, or the vessel in rem, is liable not only for furnishing unseaworthy premises and gear to workmen, but it has been held that liability for injuries to shore workmen may arise from accidents caused by defective appliances brought aboard by their own employer, *Alaska Steamship Co. v. Petterson*, 347 U. S. 396 (1954), and for the misuse of seaworthy equipment by longshoremen, *Grillea v. United States*, 232 F. 2d 919 (C. A. 2, 1956). As the orbit of liability increases, there is a corresponding increase of instances where the absolute liability of the vessel or shipowner for injuries caused by unseaworthiness is due entirely to the fault or acts of others.

The exposure of the shipowner to such claims is increased by his lack of actual control over the circumstances which create his liability. Merchant vessels are commonly placed by charter under the control of others than the shipowner, and charterers often transfer control and management of their ships to one or more subcharterers. Foreign owners frequently have no direct contact with the operation of their ships in American waters for months at a time.

Such far-reaching responsibility of the shipowner for the use of his vessel places him at an extreme disadvantage in dealing with claims of injury to shore workers arising from unseaworthiness, when such claims are due to substandard performance by shore contractors whom the shipowner did not employ, and with whom he had no actual privity. To deny indemnity in this situation is unjust and unreasonable. Every shipowner is entitled to indemnity for losses created by substandard performance by shore contractors, by virtue of his constantly increasing risk of loss under the warranty of seaworthiness which imposes liability without fault. Absence of contractual privity does not justify setting up a separate standard of recovery.

If the decision of the Court below is to stand, two identical ships at adjacent piers, employing the services of the same stevedoring company for loading or discharging

the same type of cargo, sued by longshoremen for injuries resulting from identical conduct amounting to breach of the stevedore's warranty of workmanlike service, would be allowed or denied indemnity solely on the point of privity. If the shipowner or operator of one ship had engaged the services of the stevedore, indemnity would be allowed. If the consignee of the cargo on the other ship had engaged the services, indemnity would be denied. This result is neither just nor realistic.

CONCLUSION.

The third-party beneficiary principle invoked in the *Crumady* decision (which controls this case) represents a logical and orderly development of contract law in the field of maritime relationships and furnishes needed relief to *all* shipowners exposed to the risk of loss by injury to shore workers through substandard performance of stevedoring contracts. It is not limited, as the Court of Appeals for the Third Circuit has held in this case, to owners and operators of ships, but applies to any contract which the stevedore may make, under which he goes aboard the vessel to render services. The law has been simply and directly stated by this Court in the *Crumady* case (358 U. S. at 428) as follows:

> "The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries."

Petitioner submits that the Court below erred in holding as a matter of law that petitioner, as shipowner, had no right of indemnity against the respondent stevedore without being a party to the contract for the services which were being performed aboard Steamship Afoundria when the longshoreman was injured, thereby causing loss to the

shipowner through alleged substandard performance by the stevedoring company.

Petitioner respectfully requests this Court to reverse the decision of the Court of Appeals for the Third Circuit, and to remand the proceeding for a new trial on the issue of substandard performance which was not submitted to the jury because of the summary judgment on the question of privity.

Respectfully submitted,

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HARRISON G. KILDARE,
GEORGE M. BRODHEAD,
J. WELLES HENDERSON,
Counsel for Petitioner.

Dated: August 15, 1960.
Philadelphia, Pennsylvania.

FILE COPY

No. 85

In the Supreme Court of the United States

October Term, 1950

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v.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 35

WATERMAN STEAMSHIP CORPORATION, PETITIONER

v.

DUGAN & MCNAMARA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania filed no written opinion in directing a verdict against the petitioner (R. 13–17). The first opinion of the United States Court of Appeals for the Third Circuit (R. 20–26), later withdrawn, is reported at 1959 AMC 411. The second opinion of the Court of Appeals (R. 32–37) is reported at 272 F. 2d 823.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1959 (R. 38). The petition for certiorari was filed on February 11, 1960, and granted

on March 28, 1960. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a shipowner has a right of indemnity directly against a stevedoring contractor hired by the consignee of the ship's cargo, when the shipowner suffers a liability *in personam* as a result of the contractor's breach of warranty of workmanlike service.

STATEMENT

Petitioner Waterman Steamship Corporation is the owner of the vessel S.S. *Afoundria*. Respondent, Dugan & McNamara, Inc., a stevedoring contractor, was engaged in unloading the vessel in Philadelphia on August 9, 1952, when Jasper King, one of its longshoremen, was injured by being struck by several one-hundred pound bags of sugar (R. 3–5). King sued petitioner in the Eastern District of Pennsylvania, alleging that the bags had fallen on him as a result of petitioner's negligence and the unseaworthiness of the vessel.

Petitioner thereafter entered into a settlement agreement under which it paid King $6,867.55 (R. 9, 14),[1] and filed a third-party complaint against respondent to recover it. This complaint, as amended (R. 7–10), asserted that respondent had adopted an unsafe unloading procedure under which tiers of bags were allowed to stand at a height of six feet or more

[1] Respondent has agreed that this represented a reasonable settlement for King's injury, assuming petitioner was liable for King's injuries (see respondent's brief in opposition to the petition for certiorari, p. 4).

without support, and that this failure "to perform the contracted stevedoring services in a safe, proper, customary, careful and workmanlike manner under the circumstances" was the direct, proximate, and substantial cause of the injury to King (R. 8–9).

At the trial, the parties stipulated that there was no express agreement between petitioner and respondent for the unloading of the ship (R. 12–13).[2] The district court directed a verdict on the ground that, since there was no direct contractual relationship between petitioner and respondent, petitioner had no right of indemnity against the respondent (R. 16).[3]

Petitioner appealed to the Court of Appeals for the Third Circuit. On January 16, 1959, that court, *en banc*, Chief Judge Biggs dissenting, filed an opinion affirming the district court on the basis of the lack of contractual relationship between the parties (R. 20–26).

On February 24, 1959, this Court held that a ship, liable *in rem* to a longshoreman as a result of the failure of the stevedoring contractor to perform its work safely, is entitled to indemnity from the con-

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[2] It appears that the National Sugar Refining Company, as consignee of the S.S. *Afoundria's* cargo of sugar, engaged the respondent to unload it (R. 15, 35).

[3] The court also stated that the evidence disclosed no negligence on the part of petitioner and that the sole cause of the accident was respondent's negligence in allowing the bags to be piled too high. Hence, the court reasoned, petitioner, never liable to King, had made its settlement with him "as a volunteer", and could not recover indemnity from the respondent, even if it might have a right to indemnity for amounts paid by it where it was actually liable. See p. 13, *infra*, fn. 6.

tractor directly despite the absence of direct contractual relationship between the contractor and the owner. *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423. The Court of Appeals thereupon withdrew its first opinion and granted a rehearing (R. 27, 31).

On November 5, 1959, the court again affirmed the district court's judgment. The court distinguished *Crumady* on the grounds that (1) the stevedoring contractor in *Crumady* had dealt with the charterer of the ship, while here the contractor had been engaged by the consignee of the cargo (see p. 3, *supra*, fn. 2), and (2) in *Crumady*, the ship itself was seeking indemnity for a liability suffered by it *in rem*, while in this case the shipowner claimed indemnity for its liability *in personam*.

INTEREST OF THE UNITED STATES

That a shipowner possesses a right of indemnity by reason of the stevedoring contractor's warranty of workmanlike service was settled in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, and reaffirmed in *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563, in both of which cases the United States participated as *amicus curiae*. And in *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, where the United States again participated as *amicus curiae*, this Court made it clear that the contractor's warranty, and hence the right to indemnity for losses resulting from its breach, inures to the ship regardless of whether or not there was a direct contractual relationship between the stevedoring contractor and the

vessel's owners. As in *Ryan, Weyerhaeuser,* and *Crumady,* the United States, as not only the world's largest shipowner, but also the world's largest consignor and consignee of cargoes, and in that capacity an employer of stevedoring contractors on behalf of private shipowners, is directly interested in the question posed in the present case—*i.e.,* whether circuity may be avoided and the right of indemnity asserted directly by the shipowner against the stevedoring contractor when the contractor was hired for the ship by the consignor or consignee of the cargo, and when as a result of the contractor's breach of warranty, the shipowner suffers liability *in personam.* Unless the ship's claim for breach of warranty can be thus asserted directly against the contractor, in line with *Crumady,* it will be necessary for the shipowner first to sue the United States (or other consignor or consignee who hired the stevedore contractor) on its contract of carriage with the shipowner and then for the consignor or consignee, in its turn, to seek recovery over on its contract with the stevedore.

SUMMARY OF ARGUMENT

When a stevedoring contractor goes aboard a ship to perform the shipowner's stevedoring requirements, the contractor warrants that it will perform its service competently and safely. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Co.,* 350 U.S. 124; *Weyerhaeuser S.S. Co.* v. *Nacirema Co.,* 355 U.S. 563. This warranty affords the ship a right of indemnity for liability *in rem* suffered by it as a result of the stevedoring contractor's breach of warranty, despite the fact

that the contractor was engaged to serve the ship by its charterer, rather than by the shipowner. *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423. The narrow question presented here is whether the right to indemnification, in the absence of direct contractual dealings, is affected by the fact (1) that the stevedoring contractor is hired by the consignee of the ship's cargo, rather than the charterer of the ship, or (2) that reimbursement is sought for a liability suffered by the shipowner *in personam*, rather than by the ship for a liability *in rem*. Our position is that the two bases given by the Court in *Crumady* for extending the ship's right of indemnity for losses to cases where the charterer employs the stevedoring contractor—the intent of the parties to the stevedoring contract to benefit the ship and its owners, and the foreseeability of loss by them as a result of the stevedore's breach of warranty—militate equally in favor of allowing the shipowner recovery for liability *in personam* suffered by it in cases where the contractor is hired for the ship by the consignor or consignee of the ship's cargo.

ARGUMENT

I

THE SHIPOWNER'S RIGHT TO INDEMNITY ON THE STEVEDORING CONTRACTOR'S WARRANTY EXISTS WHERE THE CONTRACTOR IS HIRED BY THE CONSIGNEE OF THE CARGO

The principal basis for the holding of the Court of Appeals that, as a matter of law, the shipowner was not entitled to recover for losses it suffered as a

result of the stevedoring contractor's breach of its warranty of workmanlike service seems to have been the fact that in this case the stevedoring contractor had boarded the vessel and performed services for its owner pursuant to an agreement with the consignee of the cargo, while in *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, the stevedoring contractor had been hired by the charterer of the ship. We submit that this attempt to avoid the impact of *Crumady* is without merit. It ignores the nature of the stevedoring contractor's inescapable and essential warranty of competent and safe performance of its services, as set out in *Crumady*, in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, and in *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563.

The operation of loading or unloading a vessel, historically performed by the vessel's crew, has, because of "the advantages of more modern divisions of labor" (*Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 96), become a "specialized service" performed for the ship and her owner by contractors. *Atlantic Transport Co.* v. *Imbrovek*, 234 U.S. 52, 61. This development, however, did not change the shipowner's absolute and non-delegable duty to provide a seaworthy vessel for a longshoreman in the employ of a contractor who boards the vessel to perform the loading or unloading portion of "the ship's work" on behalf of her owner. *Seas Shipping Co.* v. *Sieracki*, *supra*, 328 U.S. at 95. Cf. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539.

At the same time, the shipowner's right to recover indemnity from the contractor whose improper or

unsafe performance of its stevedoring service causes the shipowner to be liable under its duty to the longshoreman was made clear in *Ryan, supra.* There, the Court held that the contractor who goes aboard a vessel to perform "the ship's service with the owner's consent" (*Seas Shipping Co.* v. *Sieracki, supra,* 328 U.S. at 97) assumes, in return for its employment, "responsibility for the proper performance of all the [shipowner's] stevedoring requirements, including the discharge of foreseeable damages resulting to the shipowner from the contractor's improper performance of those requirements." 350 U.S. at 129, n. 3. See, also, *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., supra,* 355 U.S. at 565. Competency and safety are, the Court said in *Ryan,* "inescapable elements of the service undertaken" and are "of the essence of [the contractor's] stevedoring contract." The contractor's "warranty of workmanlike service" was thus "comparable to a manufacturer's warranty of the soundness of his manufactured product." 350 U.S. at 133–134.[4]

In *Crumady,* this Court held that the stevedoring contractor's assumption of responsibility for safe and proper work, and for the discharge of the shipowner's damages resulting from improper performance, was not affected by the fact that the shipowner itself was

[4] The Court also recognized (350 U.S. at 133) that, as the court below stated (R. 35), a claim for indemnification on the contractor's warranty is quite different from a claim for contribution as joint tort feasors, which, under *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282, cannot be brought against a contractor by a shipowner who is liable for personal injuries to one of the contractor's employees.

not the party who engaged the contractor for the performance of the stevedoring requirements. The Court stated (358 U.S. at 428–429):

> The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case, "competency and safety of stowage are inescapable elements of the service undertaken." 350 U.S. at 133. They are part of the stevedore's "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product" *id.* at 133–134. See *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050.

In view of this express holding that the warranty is for the benefit of the vessel "whether the vessel's owners are parties to the contract or not", it is confusing to say, as did the court below (R. 35), that "[T]he shipowner and the stevedoring company were strangers." And we think it is immaterial that the contractor deals with the consignee of the cargo rather than with the charterer. In stressing this factual distinction between this case and *Crumady* (R. 35), the court below failed to perceive that, regardless of the identity of the person who hires the contractor on the ship's behalf, the contractor goes aboard a vessel to perform for the vessel and its owners a duty—nondelegable in nature—for whose breach the latter

remain responsible. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85. Thus, regardless of who engages the stevedoring contractor—the shipowner itself, the charterer, the consignee, or any other person lawfully entitled to do so—the stevedore's essential and inescapable undertaking to perform its work carefully is, under *Crumady*, for the benefit of the ship and its owners. *Restatement of Contracts*, Section 133.[5]

Moreover, the alternative basis assigned by this Court for the result it reached in *Crumady* shows conclusively, we think, that the fact that the consignee and not the charterer engaged the stevedore on behalf of the vessel should make no difference in the outcome. As pointed out above (p. 9, *supra*), the Court concluded that the stevedoring contractor's warranty was comparable to the manufacturer's warranty of its manufactured product. *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050. Under *McPherson*, the manufacturer's liability for defects in his product extends to all those whom the manufacturer can foresee could be injured as a result of negligence in manufacture of the article. 111 N.E. at 1054, 217 N.Y. at 394. In this case, there can be no doubt that the stevedoring contractor "performing the ship's

[5] Though the record is barren on this point, the obligation of obtaining the contractor to perform the stevedoring service was necessarily undertaken by the consignee of the goods as part of its contract with the consignor, who, in turn, made such an undertaking in its contract with the shipowner. Thus, the ship and its owners are probable creditor beneficiaries. *Restatement of Contracts*, Section 133(b). However, in the unlikely event that no obligation on the part of the person hiring the stevedore could be established, the ship would clearly be a "donee beneficiary". *Id.*, Section 133(a).

service with the owner's consent" (*Seas Shipping Co. v. Sieracki, supra,* 328 U.S. at 97) can foresee—regardless of the person who engaged it to do the work—that if it fails to perform its services safely the shipowner, which has an absolute and nondelegable duty to provide a seaworthy vessel for the contractor's employees who perform its work, may suffer liability.

Thus, under one ground of the decision in *Crumady* (the intention of the stevedore and the person who engages him to do the work for the benefit of the ship and its owner) and also under the second ground (the foreseeability by the contractor of loss to the shipowner from the contractor's failure to perform the loading or unloading safely and competently) the shipowner, regardless of who engaged the stevedoring contractor, is entitled to recover from that contractor for loss resulting from the contractor's beach of its waranty to peform the ship's stevedoing requirements carefully.

II

THE RIGHT TO INDEMNITY EXISTS WHERE THE SHIPOWNER SUFFERS LOSS *IN PERSONAM*

It is similarly irrelevant that this petitioner seeks reimbursement for a personal liability undergone by it, while in *Crumady* the ship owner claimed recovery over for a liability suffered by it *in rem* as a result of the stevedoring contractor's breach of its warranty of workmanlike service.

Under *Ryan* and *Weyerhaeuser,* where the shipowner hires the contractor direct, and as a result of

the latter's breach of warranty becomes liable for failure to provide a longshoreman with a seaworthy vessel on which to work, he may recover his damages. And, in *Crumady*, where there was no direct contract between the shipowner and the contractor, indemnity was allowed a ship suffering liability *in rem* as a result of the longshoreman's injuries due to unseaworthiness.

The ship and its owner, are, of course, equally subject to liability for a breach by the contractor of the owner's nondelegable duty to provide a seaworthy vessel. *The Osceola*, 189 U.S. 158, 175, *Robinson on Admiralty*, § 57, p. 405. There is no rational ground, then, for making indemnity dependent upon whether the longshoreman decides to sue the shipowner *in personam*, or instead to proceed against the vessel *in rem*. And the reasoning underlying the decision in *Crumady* requires that the right of recovery extend to the shipowner as well as to the ship in circumstances where the contractor is hired by someone other than the shipowner (as the right of indemnity does extend in cases where the stevedore and the owner contract directly). The owner, since it must respond in damages for the contractor's breach of warranty of workmanlike service, is, as much as the ship, the intended beneficiary of the warranty (see pp. 9–10, *supra*) and the foreseeable victim of its breach by the contractor's negligence (see pp. 10–11, *supra*).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.*

Respectfully submitted.

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AUGUST 1960.

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*The court of appeals did not pass upon the second ground assigned by the district court for directing a verdict against petitioner, *viz.*, that petitioner was not negligent and hence not liable to King, and had settled with him as a volunteer. See p. 3, *supra*, fn. 3. We think this ground is without merit. The vessel was clearly made unseaworthy because of respondent's breach of its warranty of skillful performance, since it is undisputed that the bags were piled dangerously high. Under *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, a shipowner is liable in these circumstances.

U.S. GOVERNMENT PRINTING OFFICE 1960

IN THE

Supreme Court of the United States

October Term 1960

No. 35

WATERMAN STEAMSHIP CORPORATION, *Petitioner*

v.

DUGAN & MCNAMARA, INC., *Respondent*

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1960

No. 35

WATERMAN STEAMSHIP CORPORATION, *Petitioner*

v.

DUGAN & MCNAMARA, INC., *Respondent*

RESPONDENT'S BRIEF

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, overrule its prior decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* (1952), 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

II. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, strike down the force and effect, absent a contractual warranty,

of section 905 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., §901 et seq.?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

III. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, reject, overrule or impair the force and effect of the reasoning of the United States Court of Appeals for the Third Circuit in *Brown v. American-Hawaiian Steamship Company* (3d Cir., 1954), 211 F. 2d 16, and *Crawford v. Pope & Talbot* (3d Cir., 1953), 206 F. 2d 784?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

IV. If any or all of the answers to the first three questions is or are YES, then the question is

May a shipowner sued in a diversity civil action recover indemnity from an independent stevedoring contractor where neither the shipowner nor the ship are responsible for the discharge of the cargo at the port of discharge, are not responsible and do not pay for such discharging, are both strangers to the contract entered into by the stevedoring company, and neither are in privity of contract, either express or implied in fact?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

V. How can any court be expected to hold as a matter of law that a shipowner as a third party is beneficiary under a contract without having before it all the terms of the contract whether written or oral, passes comprehension.

VI. Where admittedly the stowage of the cargo by the ship was faulty and which fault admittedly rendered the

vessel unseaworthy [This is alleged by the Petitioner in its own pleadings and was offered in evidence], may the shipowner recover indemnity from the stevedoring concern which went aboard the ship at and under the directions and orders of the cargo owners as consignee, and where the consignee, as owner of the cargo, in its own behalf and for its own benefit, made an extensive written agreement with the stevedoring company to discharge all of its cargo and to pay for such discharge without designation of any ship, vessel or owner and with the designation that the stevedore would use especially proper equipment for the consignee and use the pier under the control of the cargo owner as consignee, and where the owner, as consignee, had full and complete responsibility for the discharge of the cargo, and where the owner, as consignee, had full and complete responsibility for the accruing of demurrage, including lay time cause by strikes, lockouts, harbor congestion, bad weather, and where the cargo owner, as consignee, assumed full and complete responsibility for damage to the ship and damage to the cargo while being discharged.

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

COUNTER-STATEMENT OF THE CASE

The original plaintiff, Jasper King, on June 11, 1954, filed a complaint (R. 1) seeking recovery for injuries which occurred on or about August 9, 1952 (R. 4). In February of 1956, petitioner filed a third party complaint against respondent (R. 1). In October of 1956, petitioner asked for and was granted leave to file an amended third party complaint (R. 2).

Jasper King, a longshoreman, sustained injuries when a vertical column of sugar bags about seven feet high collapsed while he and his fellow employees were discharging cargo abroad the *SS. Afoundria* while berthed in the Port of Philadelphia, Pennsylvania, U. S. A. The sugar bags had been stowed in San Carlos, Negros Island, in the Philippines, by a stevedore of the ship, unrelated and unconnected in any way with the instant Respondent stevedore or owner as consignee, about thirty-five days prior to the time the original Plaintiff, Jasper King, was injured. The bags, which contained raw sugar, were about three feet long and eighteen to twenty-four inches wide. When laid flat they were approximately fifteen inches thick. The bags were stowed parallel and run athwartship.

In the original Complaint by Jasper King alleged against the Petitioner, that his injuries were caused by the unseaworthiness of the *SS. Afoundria* and the negligence of her crew resulting from an unseaworthy or unstable stow which created an unsafe and hazardous place in which to work. (R. 4)

Specifically, Jasper King, a longshoreman, alleged in his pleading that Petitioner

> "allowed and permitted said cargo of sugar to be stowed in such a negligent and careless manner as to constitute a danger to plaintiff and other workmen unloading said cargo" and "failing to warn the plaintiff and other workmen of the dangerous and defective

stowage of the cargo of sugar" and "permitting plaintiff and other workmen to commence unloading operations in a dangerous place of employment." (R. 4)

The Petitioners Amended Third Party Complaint alleged inter alia,

> "While Jasper King and others were removing bags from a location about six feet aft of the forward bulkhead, one or more bags fell from the top of one tier and struck Jasper King, causing the various severe personal injuries mentioned in the complaint. The only condition attributable to the vessel which could have been material in connection with this accident was the placing or shifting of a bag at or near the bottom of the exposed tier in such a position that the bags above it would not be firmly supported when reached by the longshoremen, which condition must have existed in order to produce the aforesaid accident. . . ." (R. 8, 9).

In paragraph 4 of the Petitioner's Amended Third Party Complaint it is alleged:

> "The unseaworthy condition of the stow which was created by the shifting or improper placing of a bag at or near the bottom of the exposed portion of the vertical tier from which the bag or bags fell involved absolutely liability on the part of the Waterman Steamship Corporation as defendant in the original action brought against it by Jasper King as plaintiff. . . ." (R. 9)

The Respondent's Answer to the Amended Third Party Complaint averred that the

> "manner and methods in which the bags were stowed caused the vessel to be unseaworthy and was the underlying cause of the accident." (R. 10, 11)

The respondent in its Amended Answer to the Amended Complaint of the Petitioner averred:

FIRST DEFENSE

"Third-party defendant Respondent is the employer of Jasper King, the plaintiff in this case, and the accident which is the subject of the litigation occurred under circumstances making the third-party defendant responsible to the said plaintiff for benefits under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. A. Sec. 901 et seq. Sec. 5 of said Statute, 33 U. S. C. A. Sec. 905, provides that upon payment of compensation under the provisions of the said statute, third-party defendant is discharged of all liabilities to the plaintiff or any other person otherwise entitled to bring suit against the third-party defendant. Third-party defendant asserts that benefits under the said Longshoremen's and Harbor Workers' Act have been tendered and accepted by the plaintiff. Third-party defendant therefore alleges that the said statute is the complete defense to the Amended Third-Party Complaint and therefore prays that the action be dismissed as to the Third-party defendant."

SECOND DEFENSE

"To the extent that the amended Third-Party Complaint purports to set forth a cause of action against third-party defendant by way of indemnity the third-party defendant denies that there is any contract upon which indemnity may be founded."

THIRD DEFENSE

"The Amended Third-Party Complaint fails to state any ground for relief and fails to set forth any cause of action against the third-party defendant upon which relief can be granted, and therefore the Amended Third-Party Complaint must be dismissed."

SUMMARY OF ARGUMENT

A shipowner may not recover as a joint tortfeasor, via the way of indemnity, from the stevedoring corporation for injuries to its longshoremen where the shipowner originally as its responsibility and obligation improperly loaded a cargo in such a careless and dangerous manner as to cause the ship to be unseaworthy and which unseaworthiness is the underlying cause of the injuries and where the shipowner was not intended to be and was not responsible for the discharge of the cargo, was not responsible for or intended to be responsible for the expenses to be paid to the stevedore for such discharge, and who did not pay such expenses. The shipowner had no relation, contractual or otherwise, with the stevedore for the discharge of the cargo. The stevedore received and followed the orders for the discharge of the cargo from the owner as consignee. The stevedore was to use, and did use, specially manufactured equipment of the owner as consignee designed for this particular cargo and the consignee, as owner, was obliged to and did use its pier and pier facilities as owner and consignee. The owner, as consignee of the cargo, determined and paid the stevedore waiting time, overtime, sick benefits, social security, old age insurance benefits and determined the hiring and discharging of the stevedore. The contract was on a long term basis for the discharge of the owner's cargo. The contract between the cargo owner, as consignee, was strictly between the cargo owner, as consignee, and the stevedore with respect to damages to the cargo and with respect to damages to the ship during the discharge of the cargo. The ship had no title or interest in the cargo except the right to call upon the cargo owner, as consignee, for demurrage which may arise from excess lay time and to be paid therefor. The cargo owner, as consignee, was and is responsible to the ship for delays in the discharge of the cargo, work stoppages, strikes, walk-outs, sit-downs, harbor congestion, bad weather, quarantine conditions, or

for any reason not exempted in the bill of lading or charter party which gave to the ship owner the right, and only the right, to be paid for demurrage in excess of the granted lay days.

The only relief which petitioner may possibly obtain is a new trial.

ARGUMENT

QUESTION NO. I

I. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, overrule its prior decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* (1952), 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

The majority opinion of the United States Court of Appeals for the Third Circuit, 272 F. 2d 823, at p. 826, stated their conclusions with respect to the first question as follows:

> "Thus, the actual holding of the Crumady case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the carriage was on such terms and conditions that the consignee was responsible for the discharge of its own

goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer in invitum. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of contribution between tortfeasors and not one of indemnification for breach of warranty. And the Supreme Court has clearly ruled that in these stevedore injury cases the shipowner may not require contribution from the stevedoring company. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 1952, 342, 72 S.Ct. 277, 96 L. Ed. 318."

Justice Black, speaking for the Supreme Court of the United States in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* (1952), 342 U. S. 282, at page 285 stated (footnotes omitted):

"In the absence of legislation, courts exercising a common-law jurisdicition have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. This judicial attitude has provoked protest on the ground that is it inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone else. Others have defended the policy of common-law courts in refusing to fashion rules of contribution. To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.

"We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act Congress has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by the creation of a statutory schedule of compensation. The Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act (41 Stat 1007, 46 USC §688), the Public Vessels Act (43 Stat 1112, 46 USC §§781-790), the Limited Liability Act (RS §4281, as amended, 46 USC §§181 et seq.) and the Harter Act (27 Stat 445, 46 USC §§190-195). Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit. Apparently insurance companies are opposed to such a change. Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there

would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

"In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so."

In the opinion in the *Halcyon* case written by Mr. Justice Black, all of the Justices with the exception of two concurred that there could be no contribution in joint tort-feasor non-collision maritime cases. Mr. Justice Reed and Mr. Justice Burton were of the opinion that contribution ought to be allowed up to 50%. Just what has occurred to devitalize the *Halcyon* case. Congress has not legislated and if the Executive branch of the government thinks that the Longshoremen's and Harbor Workers' Compensation Act should be amended, they are in a position to present such a recommendation to Congress. Likewise, the Supreme Court has appointed a committee with respect to suggested revisions of the Supreme Court Admiralty Rules. It appears to be obvious that the Executive branch of the government could make appropriate recommendations to Congress and hearings could be had on it. It does not seem appropriate that the Executive branch of the government should join in the request that this court should legislate in the matter when it was already said within nine years ago that it was not appropriate for them to so do.

With respect to the holding in the *Crumady* decision, supra, it should be pointed out that the majority opinion of the Supreme Court makes it clear and it so stated that its decision was based upon *Ryan Stevedoring Co., Inc., v. Pan-Atlantic Steamship Corporation* (1956), 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133. Mr. Justice Douglas, speaking

for the majority of this court in the *Crumady* case, stated:

> "We think this case is governed by the principle announced in the Ryan case", 358 U. S. 423, 428, 3 L. Ed. 2d, 413, 417.

The *Ryan* case did not hold that an operator of a ship, the owner of a ship, the charterer of a ship, the agent of a ship, or the ship itself could recover indemnity on the basis of a tort in disregard of the exclusionary effect of the Harbor Workers' Act, without reliance upon a contract.

The Supreme Court in the *Ryan* case points clearly to the effect that the shipowner's responsibility is based upon a breach of warranty, 350 U. S. 124, 132. The Court specifically stated that the steamship owner in that case

> "relies entirely upon petitioner's [Ryan Stevedoring Company] contractual obligation," and "we [the Supreme Court of the United States] do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right."

The majority opinion further stated:

> "The ship owner's claim here also is not a claim for contribution from a joint tortfeasor. Consequently, the considerations which led us to the decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277, are not applicable."

The force and effect to be given to these statements of the majority opinion of the Supreme Court in the *Ryan* case is best pointed up by the dissenting opinion written by Mr. Justice Black, in which he was joined by the Chief Justice, Mr. Justice Douglas and Mr. Justice Clark. It will be observed upon a cursory examination of the *Ryan* case that that decision was not based upon the absence of the

contractual obligation and was not based upon a ruling to strike down the force and effect of the Harbor Workers' Act, absent a contractual warranty implied by law arising from a contract.

It would appear that where the Supreme Court in the majority opinion of the *Ryan* case expressly stated that its decision was not based upon absence of contract and that it did not reach the exclusionary effect of the Compensation Act, that such was its reasoning. Therefore, when this Court subsequently, as it did in the *Crumady* case, stated that such subsequent decision was based upon the *Ryan* case, it does not seem logical or warranted or necessary to place a meaning upon such later decision as suggested by the Petitioner. The *Crumady* decision now should be unanimously rejected by this Court.

QUESTION NO. II

II. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, strike down the force and effect, absent a contractual warranty, of section 905 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., §901 et seq.?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U. S. C. A., §905, provides:

> "Sec. 905. Exclusiveness of Liability. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of

such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

The majority opinion of the Third Circuit with respect to the effect of the *Crumady* decision on the above statute, declared at page 826:

"We find no indication that the Supreme Court in the Crumady case intended to abrogate or disregard the distinction between a permitted recovery-over based on contract and a prohibited misuse of the concept of indemnity to obtain contribution from a tortfeasor who enjoys the protection of the Longshoremen's and Harbor Workers' Act. We cannot square a recovery in this case with adherence to that distinction."

QUESTION NO. III

III. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, reject, overrule or impair the force and effect of the reasoning of the United States Court of Appeals for the Third Circuit in *Brown v. American-Hawaiian Steamship Company* (3d Cir., 1954), 211 F. 2d 16, and *Crawford v. Pope & Talbot* (3d Cir., 1953), 206 F. 2d 784?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

With respect to this question, the majority opinion of the Third Circuit stated (footnote omitted):

> "How this case might have stood had the stevedoring company been employed by the owner or operator of the ship to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation or undertaking as the basis of the alleged liability. Rather, as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctioness of this allegation was stipulated at trial. Whatever arrangement was made for unloading the cargo, the shipowner was not party to it and on the present record claims no standing under it.
>
> "The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. We have said as much in Brown v. American-Hawaiian S.S. Co., 3 Cir., 1954, 211 F. 2d 16, 18 and Crawford v. Pope & Talbot, Inc., 3 Cir., 1953, 206 F. 2d 784, 792. Any obligation of a stevedoring company to indemnify a shipowner for shipboard injury of its employees in the course of their employment must be bottomed on a promise, express or implied in fact, of the stevedoring company. Otherwise, tort liability would be imposed upon the stevedoring company for negligent injury of its employee, a result prohibited by the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. Sec. 901 et seq. However, it is strongly urged that the Supreme Court in Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, has rejected the reasoning and impaired the authority of the Brown and Crawford cases."

In *Brown v. American-Hawaiian Steamship Corporation* (3d Cir., 1954), 211 F. 2d 16, 18, the Court declared (footnotes omitted):

"There is, however, one aspect of the present appeal which requires further refinement. Appellant suggests that irrespective of the contractual relations between third-party plaintiff (owner) and third-party defendant (employer) in this type of suit, a right of indemnity exists where the liability of the former is secondary or passive while that of the latter is primary or active. Such a problem would be posed, for example, where the owner is held liable to a plaintiff-employe for a condition of unseaworthiness created by the employer's negligence and there is no contract, express or implied, between them, or, if such contract exists, it cannot be read to lay the groundwork for an indemnification claim. In answer to this suggestion we repeat what we thought had been made clear by the Crawford case: there can be no action of indemnity in these cases which is not based on the violation of some contractual duty. Were the rule otherwise the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act. Such a rule would be violative of Section 5 of the Act as well as of the spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. Cf. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 412, 74 S. Ct. 202."

In Note 6 to the *Ryan* case, supra, page 132, the Supreme Court wrote:

"6. We do not reach the issue of the exclusionary effect of the Compensation Act upon a right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor. See Brown v. American-Hawaiian S.S. Co. (CA 3d Pa.) 211 F. 2d 16, 18; . . ."

That Court had previously in *Crawford v. Pope & Talbot* (1953), 206 F. 2d 784, declared the same principle and the Supreme Court of the United States affirmed the same principle in *Pope & Talbot v. Hawn* (1953), 346 U. S. 406, 98 L. Ed. 143, 74 S. Ct. 202. See also page 146 of Mr. Justice Black's dissenting opinion in the *Ryan* case.

QUESTION NO. IV

IV. If any or all of the answers to the first three questions is or are YES, then the question is

> May a shipowner sued in a diversity civil action recover indemnity from an independent stevedoring contractor where neither the shipowner nor the ship are responsible for the discharge of the cargo at the port of discharge, are not responsible and do not pay for such discharging, are both strangers to the contract entered into by the stevedoring company, and neither are in privity of contract, either express or implied in fact?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

What has heretofore been said with respect to Questions I, II and III, and particularly with respect to Question III, is complete and adequate rejection of Question IV. It may also be appropriate that the dissenting opinion in *Crumady v. Joachim Hendrik Fisser*, supra, written by Mr. Justice Harlan and concurred in by Mr. Justice Frankfurter and Mr. Justice Whittaker be called to this Court's attention.

Mr. Justice Harlan wrote in the dissenting opinion re *Crumady v. Joachim Hendrik Fisser*, et al., (1959) supra, as follows:

"Since my views have not prevailed, however, I am bound to consider the indemnity issue in light of the Court's reasoning in the action for unseaworthiness. In this light I must again dissent. As I read Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124, 100 L. Ed. 133, 76 S. Ct. 232, the ship is entitled to indemnity only if the liability-inducing-unseaworthiness or hazardous working condition is created by the stevedore. Here, on the Court's premises, Nacirema merely brought into play an unseaworthy condition created by the vessel itself. And on the Court's further premise that this condition was the cause of the injuries sustained by Crumady, I think neither the decision nor the underlying principles in Ryan justifies the award of indemnity. Cf. Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U. S. 563, 568, 2 L. Ed. 2d 491, 494, 78 S. Ct. 438."

It will be recalled by this Honorable Court that in the *Ryan* case, the court was first evenly divided four and four. However, Mr. Justice Harlan was thereafter shortly appointed to this Honorable Court. The *Ryan* case was restored to the docket and reargued. Mr. Justice Harlan made the fifth member of a majority court. In the *Ryan* case, the Chief Justice, Mr. Justice Douglass and Mr. Justice Clark joined in the dissent written by Mr. Justice Black. Had Mr. Justice Harlan voted with the minority, it would have become the majority, and the *Ryan* case would have never become the law of the land. However, we now have a situation where Mr. Justice Harlan and Mr. Justice Frankfurter, who joined in the majority opinion in the *Ryan* case, now writes, and we believe correctly so, that they do not believe the *Ryan* case or the *Weyerhaeuser* case is authority for the decision in the *Crumady* case. That is the exact position of the Respondent. It is respectfully urged that neither the *Ryan* case nor the *Weyerhaeuser* case is authority for the principle that where the ship's own

stowage rendered the ship unseaworthy, that a shipowner may recover from the stevedore, nor is it authority for the proposition that a stevedore is liable if it brings into play such unseaworthy stowage condition created and caused by the ship. It is equally respectfully suggested that the *Crumady* decision dealing with third party beneficiaries is purely dictum and that the authorities relied upon do not sustain the principle enunciated in the *Crumady* case. This is so because the contract in the *Crumady* decision (transcript of record in the *Crumady* case, p. 97) is clear beyond reasonable mental difference that the agreement was made and entered into between

> "the Insular Navigation Company, as owner, operator, charterer or agent"

for the named ship and the stevedoring company as contractor. The contract specifically named the vessel, specifically provided the scheduled arrival at the Port of Newark, it specifically gave the rates and dealt with all the matters under the situation. It is specifically signed on behalf of the Insular Navigation Company, owner, operator, charterer, agent by C. J. Smith and it was likewise signed by the stevedoring contractor.

In the *Ryan* stevedoring case, in addition to what is hereinafter referred to in the analysis of that case, in the clear, unequivocal words of the majority opinion, stated:

> "This obligation is not a quasi contractual obligation implied in law or arising out of a non-contractual relationship." 350 U. S. at p. 133.

An examination of the *Weyerhaeuser* case, where there are no dissents, in an opinion written by Mr. Justice Clark, it is stated:

> "Petitioners claim for indemnity primarily rests on contractual relationship between it and respondent." 350 U. S. at p. 565.

Again, this entire Court, including those who participated in the *Crumady* case, did not dissent or disagree with the Court in the *Weyerhaeuser* case, where it stated:

> "If in that regard Respondent rendered a substandard performance which led to foreseeable liability of the Petitioner, the latter was entitled to indemnity ABSENT CONDUCT ON ITS PART SUFFICIENT TO PRECLUDE RECOVERY." (Emphasis supplied.) 355 U. S. 567.

In concluding the *Weyerhaeuser* opinion, this court unanimously agreed that:

> "In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity, in application of the theories of active or passive, as well as primary or secondary negligence is inappropriate. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., supra." 350 U. S. at p. 132-133.

In the *Weyerhaeuser case*, the Honorable Levenworth Colby, of Washington, D. C., argued the cause for the United States as Amicus Curiae. In Mr. Colby's brief, pp. 1801-1802, U. S. Supreme Court Reports, Lawyer's Edition, Annotated, will be found this statement:

> "Since the contractor's liability to the customer is of a purely contractual nature, it can be defeated only if the customer has breached a contract duty owed by it to the contractor."

Again, at p. 1802, is found the following:

> "The concept of active and passive or primary and

secondary, tortous conduct or negligence, developed in the law of quasi contractual or tort indemnity have no validity in this area of contract. Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124, 100 L. ed. 133, 76 S. Ct. 232. See also Seawright v. Garcia Cia Ltda. (D. C. P.) 138 F. Supp. 881."

It is difficult to square the Petitioner's and the Government's argument in this case with the cases of *Ryan* Stevedoring and *Weyerhaeuser.*

QUESTION NO. V

V. How may any court be expected to hold as a matter of law that a shipowner is a third party beneficiary under a contract without having before it all the terms of the contract whether written or oral, passes comprehension?

There is no possible legal foundation or basis for a third party beneficiary claim on behalf of the Petitioner, but even if such a basis existed the Petitioner completely failed in the proof of the terms of the contract. The words of Judge Swan, in the case of *THE LIZZIE D. SHAW*, 95 F. 2d 65, at page 67, put at rest any argument about the rights of a third party beneficiary without such person first proving the terms and conditions. Judge Swan stated:

"How a libelant can hope to recover on a contract, even if made for its benefit, without offering proof of the terms of the contract sued upon, passes comprehension. But, even if this hurdle were jumped, the fact remains that the contract between the Hughes corporation and the respondent was not made for the libelant's benefit. The Hughes corporation, having contracted with National to provide carriage at a freight rate of 70 cents per ton, for its own profit procured the respondent to do the work for 65 cents per ton. Recent

decisions of this court are clear authority that the libelant may not recover on the respondent's contract with James Hughes, Inc. The Castleton (C. C. A.) 64 F. (2d) 11, 13; Fat-Top Fuel Co. v. Martin (C. C. A.) 85 F. (2d) 39, 41, certiorari denied 299 U. S. 585, 57 S. Ct. 110, 81 L. Ed. 431. The case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465, is not to the contrary. There Harnden, who made the contract of carriage, was treated as the bank's agent and the bank was allowed to sue in its own name as the undisclosed principal. 6 How. 344, at page 380, 12 L. Ed. 465. Here the Hughes corporation, whose contract the libelant seeks to enforce, was not employed by the libelant; there was no agency." Certiorari denied, 302 U. S. 764.

QUESTION No. VI

VI. Where admittedly the stowage of the cargo by the ship was faulty and which fault admittedly rendered the vessel unseaworthy, may the shipowner recover indemnity from the stevedoring concern which went aboard the ship at and under the directions and orders of the cargo owners as consignee, and where the consignee, as owner of the cargo, in its own behalf and for its own benefit, made an extensive written agreement with the stevedoring company to discharge all of its cargo and to pay for such discharge without designation of any ship, vessel or owner and with the designation that the stevedore would use especially prepared equipment for the consignee and use the pier under the control of the cargo owner as consignee, and where the owner, as consignee, had full and complete responsibility for the discharge of the cargo, and where the owner, as consignee, had full and complete responsibility to ship owner for the accruing of demurrage, including lay time caused by strikes, lockouts, harbor congestion, bad weather,

and where the cargo owner, as consignee, assumed full and complete responsibility for damage to the ship and damage to the cargo while being discharged?

Even should the court believe that questions I to V inclusive do not bar the Petitioner from a recovery from the Respondent in this case, the Petitioner is barred because of fault on its own part in improperly stowing the cargo.

The majority opinion of the Circuit Court in this case stated (R. 21):

> "However, appellant claims indemnity from the stevedoring company on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was."

The original plaintiff alleged that Petitioner had improperly stowed the cargo. The Petitioner alleged that it had *improperly stowed the cargo.* It conceded that such alleged improper stowage caused the vessel to be unseaworthy. These facts are averred in the Petitioner's own pleadings. In the Ryan Stevedoring case the stevedore had agreed in writing to and did do the loading at the port of origin as well as the discharging at the port of discharge. Liability was placed upon Ryan because of the fact that Ryan improperly stowed the cargo at the port of loading. Liability was not imposed upon Ryan because it failed at the port of discharge to discover the faulty stowage. In that case the majority of the court said, 350 U. S. 134:

> "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the

contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

It is the holding of the *Ryan* case that the stevedore was responsible to the ship because Ryan improperly stowed the cargo at the port of loading. In the case which this court is now considering the Respondent did not stow the cargo and Respondent was not responsible in any way for the stowage. The Petitioner itself was responsible for the loading of the cargo and was, and is, responsible for the improper stowage. This case is converse of the *Ryan* case. The principle of improper stowage enunciated in the *Ryan* case sustains the Respondent's position. The Petitioner has its right indemnity, if any, in fact and in law against the stevedore which stowed the cargo in San Carlos, Negros Island in the Philippines.

The defective and dangerous stowage of the cargo which rendered the ship unseaworthy was, and is, the responsibility of the Petitioner. It is not even suggested and cannot be argued with a scintilla of accuracy that the Respondent, who contracted with the owner consignee to remove the cargo, had anything to do, directly or indirectly, with the improper stowage of the cargo. Nor is it suggested, and it cannot be accurately stated, that the Respondent was legally responsible, directly or indirectly, for such faulty stowage.

If this court intended in the *Crumady* case to overrule the *Ryan* case then it is respectfully urged and suggested that this court should not have stated in its majority opinion that the *Crumady* case was ruled by Ryan.

In the case of *Hagans v. Farrell Lines, Inc. v. Lavino Shipping Company*, 237 F. 2d 477 the principal of mutual rights in this class of cases is well stated. At page 482 the court wrote:

"The instant case presents the converse of the Ryan situation. Here, the shipowner, Farrell, was held responsible in the district court to the injured longshoreman because of a defective winch, i. e., unseaworthiness or a negligent failure to furnish a safe place to work. But the stevedoring contractor, Lavino, had not undertaken to perform Farrell's non-delegable duty, nor did Lavino create the defective condition. To the contrary, Farrell assumed an express obligation running to Lavino to furnish adequate winches in good order, and, as the evidence shows, to maintain and repair them.

"[5] Upon the analogy of the above cited decisions, it results that Lavino, had it paid its employee on account of injuries sustained, would be entitled, if this were all to the case, to be indemnified by Farrell therefor. Mowbray v. Merryweather, supra; Restatement, Contracts, Section 334. A fortiori, Farrell is not entitled to indemnity from Lavino. Thus, in American Mutual Liability Ins. Co. v. Matthews, supra, it was said:

"In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an exxpress promise, such an implication would be utterly unreasonable." 182 F. 2d 322, 324.

"[6] Accordingly, it can only be concluded that Hagans' injury is the result, as the jury found, of Farrell's own conduct, which at once violated its duty

to the longshoreman and to Lavino. As held in the Ryan decision, supra, the promisor cannot use the promisee's failure to discover and correct the promisor's own breach as a defense. See, Restatement, Restitution, Section 93, and Comment a.

"Farrell, however, bases its claim to indemnity upon the asserted neglect of Lavino, first, in using the winch knowing its condition to be defective, and second, upon the conduct of the hatchman, Oliver, in signalling the draft out of the hold without making certain Hagans was no longer in its path.

"Knowledge of and acquiescence in the existence of a defective appliance or condition may prevent the fruition of the right to indemnity. Restatement, Restitution, Sections 93 and 95, and Reporters' Notes. But it does not necessarily follow that the burden to indemnify is thereby created.

"[7] Where the parties have violated similar duties to the injured person, neither is entitled to relief against the other. Union Stock Yards Co. v. Chicago, B. & Q. R. Co., 1905, 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453. Absent the compensation act, and hypothesizing the legal impossibility of contribution, the independent neglect of Lavino to Hagans would qualify Lavino as a joint tort-feasor with Farrell, in which event Farrell could not recover either contribution or indemnity. Restatement, Restitution, Section 102. But, as we have already stated, Farrell's right to indemnity must arise out of the legal relationship between it and Lavino, and not out of the relationship to the employee. To this proposition we are previously committed by our decisions in the Brown and Crawford cases, supra; see also, Slattery v. Marra Bros., Inc., supra.

"Here, Farrell was under a continuing responsibility to Lavino for the good order and maintenance of the winches. It fell down on the job. Indeed, it went

further, for its repairman gave Lavino affirmative approval of the equipment in the presence of a ship's officer. At most, Lavino used the defective winch only a few times in the hour and a half which intervened between commencement of the use and the accident to Hagans. We see nothing in this situation which should require Lavino to indemnify Farrell. McKay v. Pedigree Fabricks, Inc., Sup. 1947, 74 N.Y.S. 2d 386. Farrell's complaint that the hatchman erred in signalling the draft out of the hold before ascertaining that Hagans was out of the way does not amount to other than contributing neglect; except for the fact that the hatchman tripped on his way across the deck, he would have had adequate time to warn Hagans. Nothing in the record suggests intentional or reckless conduct on the part of Lavino which would permit the conclusion that Lavino's violation of duty toward Farrell supersedes Farrell's violation of duty toward Lavino. See Restitution, Section 97.

"Reliance by Farrell upon cases which characterize the conduct of the indemnitor as the "sole", "active" or "primary" cause, does not assist, for as stated, the indemnitor was held to have brought about the condition or defect for which the indemnitee was charged. Here, the ground upon which Farrell was held liable to Hagans was its own doing; as between Farrell and Lavino, Farrell had assumed the responsibility. If anything, Lavino only contributed to the happening of the accident. But if Lavino failed to perform its work properly, we are constrained to hold that, in the face of mutual violations, Farrell is not entitled to full indemnity, and, of course, it cannot have contribution."

The case of *MacPherson v. Buick Motor Corporation*, 217 N. Y. 382, is authority in a tort case that the injured party may recover *directly against* the manufacturer of a

dangerous product. The Buick case is not authority in this class of cases for the proposition asserted by the Petitioner. It was a negligence case—Cardozo, *J.*, stated page 385:

> "The charge is one,——of negligence".

As indicated above this court recently wrote in the *Weyerhaeuser* case:

> "If in that regard Respondent rendered a substandard performance which led to foreseeable liability of the Petitioner, the latter was entitled to indemnity ABSENT CONDUCT ON ITS PART SUFFICIENT TO PRECLUDE RECOVERY". (Emphasis supplied). 355 U. S. page 567.

An analysis of the Petitioner's pleadings demonstrates clearly that the bag which caused the collapse of the tier was the bag which had been improperly placed, or shifted, at the bottom of the tier. Under the Petitioner's own statement of this case, its acts were those which caused the injury to the original plaintiff, or at best contributed to that injury as a joint tort-feasor.

It is provided by the rules of this Court that the Government may file a brief for the United States as Amicus Curiae without first obtaining the consent of the parties. It is respectfully suggested that the brief of the Government is not helpful, but, on the contrary, it is confusing as to the policy of the executive departments of the United States.

The administration of the American Merchant Marine, owned by the Government of the United States, has been entrusted to the Maritime Division of the Department of Commerce. The Secretary of Defense, as well as Secretary of the Navy and the Secretary of Labor, are vitally concerned when it comes to the question of our Merchant Marine in the matter of national defense and security. In its Amicus Curiae Brief, the Government failed to give the Court the benefit of the policy position of the Maritime

Commission or the executive department's position with respect to the various bills placed in Congress dealing with the question of the responsibility in this class of cases. The suggestion that the United States has an interest in this question is undoubtedly true, but it is doubted that the executive departments of the Government of the United States have arrived at and issued a policy with respect thereto. The Respondent wishes, of course, that the Court should have the benefit of the policy positions of the various executive departments of the Government of the United States with respect to the issue of joint tortfeasors in this class of cases. The brief does not give the Court the benefit of the testimony of any of the personnel of the executive departments which have the administration of the Merchant Marine under their supervision, nor does it give the Court any help with respect to the number of bills that have been introduced in Congress with respect thereto, and whether or not hearings have been held, and what was the policy stated by the Maritime Division of the Department of Commerce.

It is not believed that the rule intended the Department of Justice to throw the weight of the United States on one side or the other with respect to a lawsuit between private parties. The far reaching effect of the suggestion contained in both Petitioner's brief and that of the Amicus Curiae has already been answered by this Court in the *Halcyon* decision.

Some of the national, as well as the international, problems and the background of our Merchant Marine are outlined in the May issue of 1960 of the *Columbia Law Review*, page 712. If the Maritime Commission and other executive departments, including Labor and Defense, actually are in favor of the abolition of the *Halcyon* decision, the rules provide that their representatives may appear and file a brief with the Court. If they do not favor it and Congress has not yet determined upon it, it is respectfully suggested that the brief Amicus Curiae be considered in that light.

It appears that the underlying chief complaint of both

the brief of the Petitioner and that of the Amicus Curiae is that the rulings of this Court on the question of unseaworthiness and liability of the ship therefor are too harsh. The suggestion by the Petitioner and by the Amicus Curiae brief is, or appears to be, a desire to shift such non-delegable responsibility for seamen and for longshoremen to the stevedoring companies.

The indulgence of the brief Amicus Curiae and the assertion of facts admittedly not of record, but which could have been accurately ascertained and properly placed in evidence, does not appear to the Respondent to be helpful or to the best interest of anyone.

With respect to the so-called strict ruling by this Court as to unseaworthiness and non-delegable duty of the vessel, this question could be disposed of very easily by the executive departments, including that of the Department of Justice, making proper recommendations to the Congress of the United States for legislation pertaining thereto.

The argument on page 5 of the Amicus Curiae brief seems to urge that this Court should extend further the *Crumady* decision so as to permit a ship's claim to be asserted directly against the stevedore without any proof of contractual rights and obligations of the respective parties and without regard to the limitations and restrictions in the Longshoremen's and Harbor Workers Act. The Amicus Curiae brief bases the necessity for such an extension of the *Crumady* case on the ground that it would avoid circuity of suits, i.e., the shipowner would have to sue the United States or other consignee or consignor who hired the contractor on his contract of carriage with the shipowner, and then the consignee or consignor in turn would have to seek recovery on its contract with the stevedore. This argument must fall because the Federal Rules of Civil Procedure permit a defendant, or defendants, to bring in third party defendants, and likewise the Supreme Court Admiralty Rules permit the filing of cross-libels and the impleading of other parties respondent. It is submitted that such a

procedure is far better than a hazardous guess as to the terms of the bill of lading, the terms of the charter party, whether it be a time charter, voyage charter or private contract. It would be better to have the terms of the contract between the purchaser of the cargo and the ship, the owner of the ship and the cargo, the receiver of the cargo, and the terms of the contract of the owner of the cargo with the stevedore all before the Court. In reality, what this Court is being asked to do is to not only strike down the exclusionary provision of the Longshoremen's and Harbor Workers' Act, but to strike down the entire basis of the Act. If that is the policy of the executive departments of the Government, it should go to Congress for such legislation. It should not ask this Court to legislate.

The brief Amicus Curiae, Note 5, page 10, admits that the record is barren of the obligation of the parties, but suggests that probably the ship and its owners are creditor beneficiaries. It is not believed that it was the intention of this Court when it promulgated the rule permitting the Government to file a brief Amicus Curiae to lend its great weight to the aid of a private party in litigation on assumptions not of record and which the majority opinion of the Court of Appeals declared did not exist.

The tenor of the brief Amicus Curiae is that the Respondent was hired for the purpose of performing work and responsibilities of the ship to discharge the cargo. The expression, did not hire directly, used in both the Petitioner's brief and that of the Amicus Curiae appears to wish to make this Court believe that the stevedore was hired indirectly by the ship to do the discharging. Again, the majority opinion ruled twice that this innuendo was ill founded and no effort has been made by anyone to ask leave to put in evidence to sustain the correctness of that innuendo. It is submitted that the assumption by the brief Amicus Curiae that the Respondent was hired in this case to perform work and responsibilities in the discharge of the cargo was incorrect and totally unsupported by any evi-

dence. It is not helpful to refer to historical situations and then to ask this Court to try to predicate a far reaching decision upon facts and contracts which are completely different than the historical situation.

In passing, it may be noted that the Honorable Levenworth Colby, in his briefs before this Court in cases of this class declared that indemnity was not based upon negligence. The brief of Amicus Curiae in reality is urging this Court to adopt a principle not in keeping with either the *Ryan* stevedoring case or the *Weyerhaeuser* case and in direct conflict with the *Halcyon* decision. It is submitted that the holding of the majority of the Third Circuit was that the stowage was admittedly faulty and that the shipowner asserted none and claimed no rights under the contract between consignee and stevedoring contractor. It is not alleged in the Petitioner's pleadings—and of course it would not be true—that the contract with the stevedore was made for the ship. It is not alleged by the Petitioner that the ship was responsible for the unloading and discharge of the cargo. It is not alleged by the Petitioner that the ship assumed any responsibility, directly or indirectly, for the discharge of the cargo.

On page 6 of the Amicus Curiae brief, it is argued:

> "When a stevedoring contractor goes aboard a ship to perform the shipowner's requirements . . . contractor warrants that it will perform its service competently and safely."

The stevedoring contractor did not go aboard this ship to perform the shipowner's stevedoring requirements. This is a pure assumption without foundation and it was so declared by the majority opinion of the Court of Appeals. The National Sugar Refining Company has offices in Philadelphia. It could have been sued in Philadelphia. In fact, both it and the Respondent could have been sued by the Petitioner in this litigation but such was not done.

In the first majority opinion filed by the Court of Ap-

peals, in which six of the Judges concurred, the Court of Appeals declared (R. 21):

> "How this case might have stood had the shipowner employed the stevedoring company to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation between shipowner and stevedoring company. Rather, as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Thus, whatever arrangement was made for unloading the cargo, the shipowner was not party to it and claims no benefit under it."

Thereafter, the Court of Appeals, on the basis of the *Crumady* case, granted a rehearing on April 7, 1959 (R. 31). The case was reargued on October 9, 1959, and the majority of the Court of Appeals, in its last opinion, stated (R. 33):

> "How this case might have stood had the stevedoring company been employed by the owner or operator of the ship to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation or undertaking as the basis of the alleged liability. Rather, [fol. 286] as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. *The correctness of this allegation was stipulated at trial.* Whatever arrangement was made for unloading the cargo, the shipowner was not party to it and on the present record claims no standing under it." (Emphasis supplied.)

It will be recalled that the Petitioner, after the District Court (Judge Clary) directed a verdict against it,

did not file any post-trial motions with that Court and has not from that day to this made any attempt of any nature to place the charter party, bill of lading and stevedoring contract in evidence.

Something might be said in respect to the question of third-party beneficiaries, even though, as noted in *THE LIZZIE D. SHAW*, supra, it passes comprehension how a party may claim the benefits of a contract without proving its terms and conditions. In view of the availability of the owner, as consignee, in the very same district as the Respondent, one may draw one's own conclusions as to why those contracts were not subpoenaed and not asked for, and why counsel for the Petitioner stipulated that there was no privity of contract.

The case of *Isbrandsten Co. Inc. v. Local 1291 of International Longshoremen's Ass'n*, 204 F. 2d 495, involved a suit on a contract by one not a party to it.

Isbrandsten Company was the time charterer of a ship called the NYCO. Isbrandsten in turn chartered the ship to the Scott Paper Company for the purpose of transporting pulp from Nova Scotia to Philadelphia. Under the terms of the charter party, the Scott Paper Company was to load and unload the vessel. Scott Paper Company in turn hired the Lavino Shipping Company to do the unloading. When the vessel got to its destination, the employees of Lavino started to unload it and during the unloading stopped work contrary to the provisions of the contract which their union had with their employer. The parties to the contract were the Philadelphia Marine Trade Association, of which Lavino Shipping Company was a member, as collective bargaining agent for those of its members who employ longshoremen, and Local 1291 of the International Longshoremen's Association. The contract provided, among other things, that there was to be no work stoppage pending arbitration of disputes which might arise. Isbrandsten, alleging that the delay in unloading the ship caused it damage, sued under Section 301(a) of the Labor Management

Relations Act of 1947. Alternatively it claimed, there being diversity of citizenship and the requisite jurisdictional amount, to be able to recover as a matter of common law. An able and learned discussion of the rights of third parties ~~When the vessel got to its destination, the employees of La-~~ is given in the opinion of the United States Court of Appeals for the Third Circuit. That Court, composed of Judges Maris, Goodrich and McLaughlin, Goodrich writing the opinion, concluded that there was no liability, the court stating at page 497:

> "We see no possibility that Isbrandsten can be a creditor beneficiary of this labor union. The labor union was a complete stranger to Isbrandsten so far as this transaction is concerned. Neither owed the other anything. And, therefore, there was no obligation on the part of either to do anything to or for the other. Nor do we see any possibility of making out of this situation a donee beneficiary relationship. This is not like a contract where a father buys an insurance policy to build up an estate for his son. It was a labor contract made between this association and a union. The contract recited that the association was acting on behalf of its members who employ longshoremen. Lavino is one of those members. But it does not appear that either Scott or Isbrandsten was a member, and there is no allegation that either one employed longshoremen.
>
> "There is considerable language in the Restatement and in the cases and decisions about 'intent' and 'accompanying circumstances'. From that the argument is made to us that the court should not have dismissed under Rule 12 but should have heard the plaintiff upon an attempt to make a showing of the supposed intention of the parties with regard to persons to benefit by the contract.
>
> "But we think that the whole setting of this fact situation as described in the complaint and exhibits is one which completely negatives a gift transaction

under any possible interpretation of that term. The contract between the association and the labor union was a usual type of collective bargaining agreement. The contract between Isbrandsten and Scott was a charter party in the ordinary form made upon stated money consideration. We do not have before us a copy of the contract between Scott and Lavino, but the complaint describes it as an agreement whereby Lavino promised Scott to discharge a cargo of wood pulp from the vessel. We cannot think that Lavino was making a gift to Scott or that Scott was making a gift to Isbrandsten. In other words, all the transactions were usual business transactions in which parties were agreeing to do things for and pay money to each other."

The case of *Robins Dry Dock & Repair Co. v. Flint, et al.*, 275 U. S. 303, was a libel by time charterers of the Steamship BJORNEFJORD against the Dry Dock Company to recover for loss of use of the steamer. Libellants recovered in both courts below, a writ of certiorari was granted, and the Supreme Court, by Mr. Justice Holmes, delivered an opinion reversing the two lower courts. The Court said, at page 307:

"The present libel 'in a cause of contract and damage' seems to have been brought in reliance upon an allegation that the contract for dry docking between the petitioner and the owners 'was made for the benefit of the libellants and was incidental to the aforesaid charter party' &c. But it is plain, as stated by the Circuit Court of Appeals, that the libellants, respondants here, were not parties to that contract 'or in any respect beneficiaries' and were not entitled to sue for a breach of it 'even under the most liberal rules that permit third parties to sue on a contract made for their benefit.' 13 F. (2d) 4. 'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct

benefit.' *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U. S. 220, 230. Although the respondents still somewhat faintly argue the contrary, this question seems to us to need no more words.

The above statement of the law is in consonance with the decisions dealing with contracts for the carriage of goods, discharge of goods and the rights of time charterers, sub-charterers and other parties referred to in the Petitioner's brief. For example, a sub-charter of a vessel, even on the same terms as the original charter, does not create any contract relation between the sub-charterer and the owner; The *BANES*, 221 F. 2d 416. See also *Actieselskabet Dampsk, Thorbjorn v. Harrison Co.*, 260 F. 287; *Dampskibs Aktieselskabet Thor v. Tropical Fruit Co.*, 281 F. 740; *Phosphate Mining Co. v. Unione Austriaca Navigazione Gia Austro-Americana & Fratelli Cosulich Societa Anonima*, 3 F. 2d 239; *THE NORTHERN NO. 29. Flat-Top Fuel Co., Inc. v. Martin*, 15 F. Supp. 543.

Both the Petitioner and the brief as Amicus Curiae apparently go on the basis that a stevedore, regardless of what may be the factual and contractual situation, ipso facto insures the ship in this class of cases.

It is respectfully suggested that the court reëxamine the rulings for which it is now asserted the *Crumady* case stands. It is the opinion of the Respondent that there cannot be any doubt but what the ship was a party to the contract in the *Crumady* case and that the ship had full rights and benefits under it. The contract expressly so provided and regardless of what may have been said or is said to the contrary, the record proves it. The other part of the *Crumady* case with respect to a stevedore's bringing into play an already dangerous and unseaworthy condition of the vessel thereby making the stevedore solely responsible, suggests a further review by this court.

There does not seem to be any necessity to add further to the reasoning of Justice Black in the *Halcyon* decision as to why this court should not take the action urged by the Petitioner, i.e., legislate in re the Longshoremen's and Harbor Workers' Act.

Whether or not the position of the Solicitor General is correct is not for the Petitioner, Respondent or this Court to decide. It is for the Congress of the United States and no one is in a better position to have a hearing before the proper Committees of the House and Senate with respect to such matters than the Executive Departments, including the Department of Justice.

It is respectfully submitted that neither the Executive Department nor this Court under the Constitution of the United States is the Legislative branch of the Government where the Legislative branch has already acted in the matter and stopped short of what the Executive Department now asks this Court to do.

Conclusion

It is respectfully suggested and firmly urged that the decision of the majority of the United States Court of Appeals Third Circuit be unanimously affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1960.

Waterman Steamship Corporation, Petitioner, *v.* Dugan & McNamara, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November 21, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner is the owner of the vessel *S. S. Afoundria*. The respondent is a stevedoring company. A longshoreman employed by the respondent was injured aboard the *Afoundria* while engaged with other employees of the respondent in unloading the ship at the port of Philadelphia. The cargo consisted of bagged sugar. The longshoreman was working in the hold, and his injuries resulted from the collapse of a vertical column of hundred-pound bags which the unloading operations had left without lateral support.

He sued the petitioner in the District Court for the Eastern District of Pennsylvania to recover for his injuries. The petitioner settled the claim and, by way of a third-party complaint, sought to recover from the respondent the amount paid in satisfaction of the longshoreman's claim. The third-party complaint alleged that improper stowage of the cargo [1] had created an unseaworthy condition in the ship's hold which had imposed absolute liability upon the petitioner as shipowner for the longshoreman's injuries, but that "the direct, proximate, active and substantial cause of the accident" had been

[1] The cargo had been loaded in the Philippines several weeks earlier by a stevedore unrelated to the parties to the present proceeding.

the negligence of the respondent, who, by "failing to perform the contracted stevedoring services in a safe, proper, customary, careful and workmanlike manner," had brought the existing unseaworthy condition into play.

As an affirmative defense the respondent stevedore alleged that there had been no direct contractual relationship between it and the petitioner covering the stevedoring services rendered the *Afoundria* in Philadelphia. At the trial the parties stipulated that this allegation was correct, it appearing that the consignee of the cargo, not the petitioner, had actually engaged the respondent to unload the ship. The District Court directed a verdict for the respondent, holding that a shipowner has no right of indemnity against a stevedore under the circumstances alleged in the absence of a direct contractual relationship between them. The Court of Appeals for the Third Circuit affirmed in an *en banc* decision, three judges dissenting.[2] Certiorari was granted to consider whether in a situation such as this the absence of a contractual relationship between the parties is fatal to the indemnity claim. 362 U. S. 926.

In *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124, it was established that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of the contract with reasonable safety. This warranty of workmanlike service extends to the handling of cargo, as in *Ryan*, as well as to the use of equipment incidental to cargo handling, as in *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563. The warranty may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness. *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 429. The fac-

[2] 272 F. 2d 823 (on rehearing).

tual allegations of the third-party complaint in the present case comprehend the latter situation.

In the *Ryan* and *Weyerhaeuser* cases considerable emphasis was placed upon the direct contractual relationship between the shipowner and the stevedore. If those decisions stood alone, it might well be thought an open question whether such contractual privity is essential to support the stevedore's duty to indemnify. But the fact is that this bridge was crossed in the *Crumady* case. There we explicitly held that the stevedore's assumption of responsibility for the shipowner's damages resulting from unsafe and improper performance of the stevedoring services was unaffected by the fact that the shipowner was not the party who had hired the stevedore. That case was decided upon the factual premises that the stevedore had been engaged not by the shipowner, but by the party operating the ship under a charter. The Court's language was unambiguous:

> "We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U. S., at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133–134. See *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050.
>
> "We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the

vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." 358 U. S. 428–429.

This reasoning is applicable here. We can perceive no difference in principle, so far as the stevedore's duty to indemnify the shipowner is concerned, whether the stevedore is engaged by an operator to whom the owner has chartered the vessel or by the consignee of the cargo. Nor can there be any significant distinction in this respect whether the longshoreman's original claim was asserted in an *in rem* or an *in personam* proceeding. In the *Ryan* and *Weyerhaeuser* cases *in personam* liability was asserted. In the *Crumady* case the injured stevedore had brought an *in rem* proceeding. The ship and its owner are equally liable for a breach by the contractor of the owner's nondelegable duty to provide a seaworthy vessel. *The Osceola*, 189 U. S. 158, 175; cf. *Continental Grain Co. v. Barge FBL–585*, 364 U. S. 19. The owner, no less than the ship, is the beneficiary of the stevedore's breach of warranty of workmanlike service.

Accordingly the judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

Reversed and remanded.